

7-1990

Habeas Corpus Committee - Correspondence

Lewis F. Powell Jr.

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OFFICE OF THE
ATTORNEY GENERAL

DON SIEGELMAN
ATTORNEY GENERAL
MONTGOMERY, ALABAMA 36130
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5 JUL 1990



STATE OF ALABAMA

Sally - file
Ad Hoc Committee

July 2, 1990

Honorable Lewis F. Powell
United States Supreme Court Justice
United States Supreme Court
One First Street NE
Washington, DC 20543

Dear Justice Powell:

It has occurred to me that you might be interested in the two joint letters which were sent to the House Judiciary Committee in opposition to Representative Kastenmeier's federal habeas bill (H.R. 4737). As you will note, page 4 of the joint letter signed by the attorneys general of 23 of the 36 capital punishment states concurs in the opinion which you expressed concerning this legislation in your testimony before the subcommittee.

While it may sometimes seem as though no one in Congress appreciates your committee's work, please be assured that there are those of us in the states who do.

Sincerely,

Ed Carnes

Ed Carnes
Alabama Assistant Attorney
General

EC:sf
Enclosures
2095t

June 25, 1990

Honorable Jack Brooks
Chairman of the Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Representative Brooks:

Although our states do not have capital punishment statutes, we are adamantly opposed to H.R. 4737, because it contains provisions which would have a detrimental effect on how our non-capital cases are handled in federal habeas corpus proceedings. All of the provisions of that bill which are discussed in this letter apply to non-capital as well as capital cases, and all of them would undermine our interests in federal-state comity, in avoiding unnecessary delay, and in minimizing the need for relitigation of cases.

Section 7 of H.R. 4737 would redefine the "cause" component of the procedural default rule in a way that would prevent application of that rule in a large number of cases. The change that would be effected by Section 7 of the bill would encourage criminal defendants to raise for the first time in federal habeas issues they could have and should have raised in state courts. This provision would go a long way toward undermining the value of a state trial court as the principal forum in which issues are litigated.

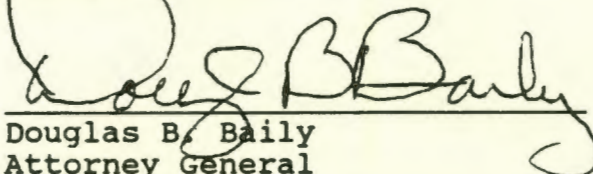
Section 6 of H.R. 4737 would repeal the Teague v. Lane, 109 S.Ct. 1060 (1989), non-retroactivity doctrine. The Teague decision came in a non-capital case, and it represents a recognition by the United States Supreme Court that there is a need for finality even in non-capital cases. This bill would ensure that virtually every decision has full retroactive effect regardless of whether that decision is necessary to ensure the fairness of a trial or the accuracy of the determination of guilt. The Teague rule is one of the best doctrines that we have to promote the finality of state court judgments, and Congress should not overrule it.

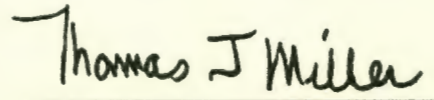
Hon. Jack Brooks
Page 2
June 25, 1990

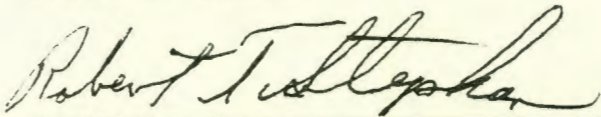
Section 9 of H.R. 4737 would amend the exhaustion requirement of existing law to permit a convicted criminal to use it as an excuse to repetitively file federal habeas petitions rather than exhausting his state remedies as to all his claims and presenting them at one time to a federal court. Section 9 of the bill would unnecessarily rewrite 28 U.S.C. §2254(a) and might open the way to arguments that state law claims could be presented in federal habeas proceedings.

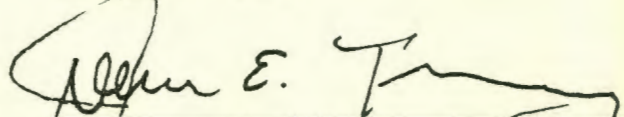
Because our states do not have capital punishment statutes, we express no opinion concerning those parts of H.R. 4737 that apply only to capital cases. However, every one of the provisions of this bill which is applicable to non-capital cases is unwarranted, unwise, and would be a blow to the interests of the states and law enforcement.

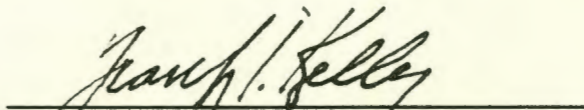
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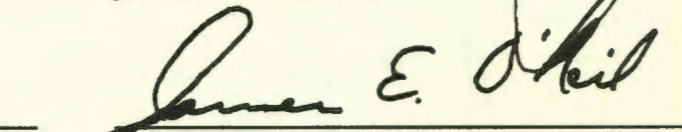

Douglas B. Baily
Attorney General
State of Alaska

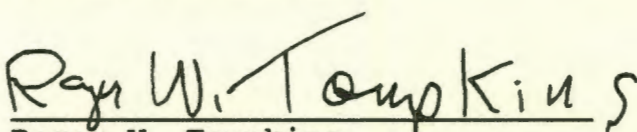

Thomas J. Miller
Attorney General
State of Iowa

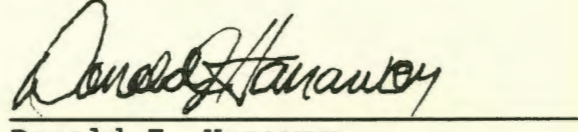

Robert T. Stephan
Attorney General
State of Kansas


James E. Tierney
Attorney General
State of Maine


Frank J. Kelley
Attorney General
State of Michigan


James E. O'Neil
Attorney General
State of Rhode Island


Roger W. Tompkins
Attorney General
State of West Virginia


Donald J. Hanaway
Attorney General
State of Wisconsin

June 25, 1990

Honorable Jack Brooks
Chairman of the Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Representative Brooks:

Our states have capital punishment statues, and each of our offices has had experience in federal habeas litigation. We are writing to express our very strong opposition to H.R. 4737 and to urge you and the other Judiciary Committee members not to give the bill a favorable report.

Every major provision of H.R. 4737 would undermine the finality of state court judgments, would increase delay, and would foster relitigation. It is easy to understand why application of the provisions of this bill are mandatory, instead of optional with the states as is the case in some of the other habeas proposals. No state in this country would voluntarily come under the provisions of H.R. 4737.

The Provisions That Are Applicable To
Both Non-Capital and Capital Cases

Some of the provisions of H.R. 4737 are applicable to all state court judgments subjected to review in a federal habeas proceeding, including both non-capital and capital cases. Section 7 of the bill would eviscerate one of the principal components of the procedural default doctrine by redefining the "cause" component of the Wainwright v. Sykes, 433 U.S. 72 (1977), rule. That change would undermine the finality of state court judgments, would shift the focus away from the trial as the main event in a case, and would encourage "sandbagging" by criminal defendants and their counsel.

Section 6 of H.R. 4737 would repeal the non-retroactivity doctrine of Teague v. Lane, 109 S.Ct. 1060 (1989), and related cases, and it would make the law even less conducive to

Hon. Jack Brooks
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finality than it was before the Teague decision. State courts cannot be expected to follow procedural requirements that have not even been announced at the time they rule in a case, yet that is what this section of the bill would require. The Teague doctrine prevents that, with appropriate exceptions to ensure fairness and accuracy of decision making, and it should not be overruled by Congress.

Section 9 of H.R. 4737 would amend the exhaustion requirement of 28 U.S.C. §2254(b) in such a way as to ensure a convicted criminal the right to litigate in federal court in a piecemeal fashion without fear that such a strategy would be barred by the abuse of the writ doctrine. That change, which would encourage piecemeal litigation and delay, should not be made. Section 9 of the bill would also unnecessarily amend 28 U.S.C. §2254(a). As now written, that statutory provision clearly restricts federal habeas corpus to consideration of federal law claims. As rewritten by this bill, the existing law which bars state law claims from federal habeas would be less clear.

The Provisions Of The Bill That Are
Applicable Only To Capital Cases

H.R. 4737 also contains a number of provisions, applicable only to capital cases, which we strongly oppose. Sections 2 and 3 of the bill, operating together, guarantee a death-sentenced criminal a minimum of an additional one-year period of delay between filings. That period can be extended to one year and three months or even longer in certain circumstances. At a time when virtually everyone agrees that final resolution of capital cases is delayed far too long already, this bill would guarantee convicted murderers additional delay over and beyond that which already exists. Moreover, nothing in the bill would require the federal courts to expeditiously consider capital case petitions and to promptly rule on them.

Significant problems exist with second and successive petitions in capital cases. Instead of attempting to correct those problems, Section 4 of H.R. 4737 would exacerbate them. It would do nothing to improve existing law on the subject, and it would make things worse in several respects. For example, the bill would authorize a federal court to inquire into the "appropriateness" of a death sentence in a particular case. Weighing of aggravating and mitigating circumstances, and the decision about whether a defendant should be sentenced to death

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under a particular set of facts and circumstances is the function of juries and state court judges, not the federal judiciary.

Section 8 of H.R. 4737 contains provisions concerning counsel in capital cases that are so extreme as to be absurd. The constitutional requirement of effective assistance of counsel exists, and that requirement is enforced by the state and federal judiciary. Contrary to what many have alleged, virtually all capital murderers do receive effective representation. The few who do not are granted relief in the form of new trials or new sentence proceedings. The current problems which beset capital cases are not caused by the quality of representation that defendants receive.

Section 8 of H.R. 4737 would authorize a federal court to set aside the conviction or sentence of a murderer who is indisputably guilty, who clearly deserves a death sentence, and who receives constitutionally effective legal representation throughout all the proceedings, if the additional counsel requirements set out in the bill are not met. For example, if H.R. 4737 had been the law then, serial murderer Ted Bundy could have had his conviction or sentence set aside if his attorney had not attended a specialized training program within a year prior to his appointment to represent Bundy; or if the attorney had previously tried two homicide cases instead of three; or if he failed to meet the as yet unspecified performance standards, over and beyond those the Constitution requires, which are to be promulgated by a group that will in all likelihood be dominated by death penalty opponents. We find that possibility to be offensive.

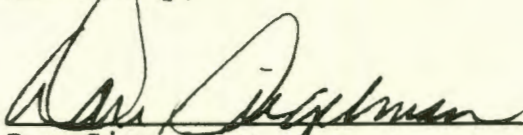
Even if the states could meet the enormous financial burden Section 8 of the bill would impose, and even if enough attorneys could be found who would meet its extreme requirements, the entire thrust of this provision is wrong. The Constitution, as interpreted in decisions such as Strickland v. Washington, 466 U.S. 668 (1984), specifies constitutional standards of representation. Beyond those standards, which are enforced under existing law, the focus in a capital case should be on the guilt or innocence of a defendant and on the sentence he should receive. Congress should not shift the focus of the criminal justice system away from guilt, innocence, and sentence and toward how many seminars a defense attorney has attended, how well he is paid, and other collateral matters.

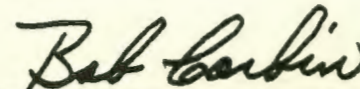
Hon. Jack Brooks
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June 25, 1990

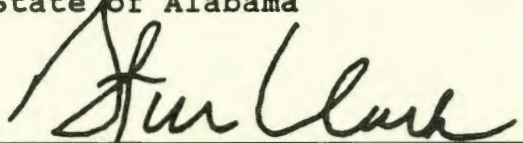
In Justice Powell's testimony before the subcommittee concerning this legislation, he expressed his opinion that enactment of H.R. 4737 would have the practical effect of eliminating enforceable capital punishment in the United States. We concur in that judgment. The overwhelming majority of the people of this country believe in capital punishment in cases of aggravated murder, and they believe that there should be less delay, less relitigation, and more finality in these cases. To enact H.R. 4737 would result in more delay, more relitigation, and virtually no finality in capital cases. It would do much to effectively end capital punishment by hedging it about with so many obstacles as to make its imposition virtually impossible.

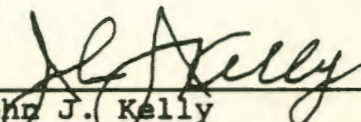
We strongly oppose H.R. 4737 and any legislation containing provisions similar to those contained in it. Please see that a copy of this letter is distributed to each member of the Judiciary Committee.

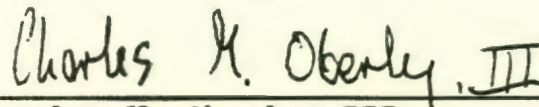
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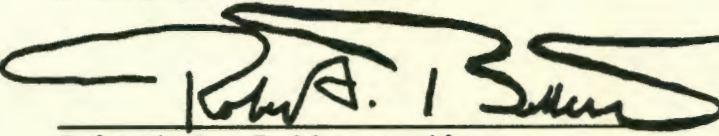

Don Siegelman
Attorney General
State of Alabama

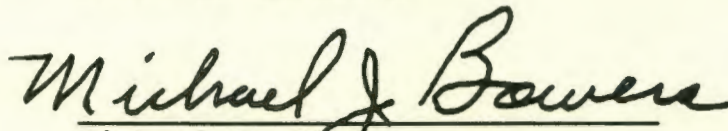

Bob Corbin
Attorney General
State of Arizona

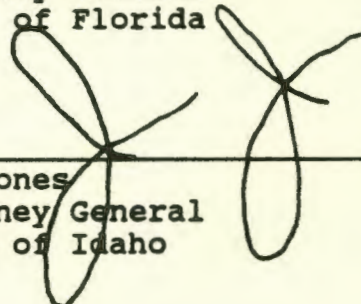

Steve Clark
Attorney General
State of Arkansas

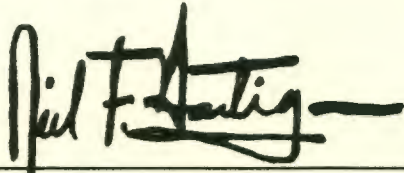

John J. Kelly
Chief State's Attorney
State of Connecticut


Charles M. Oberly, III
Attorney General
State of Delaware

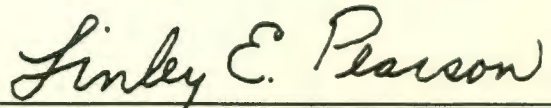

Robert A. Butterworth
Attorney General
State of Florida


Michael J. Bowers
Attorney General
State of Georgia

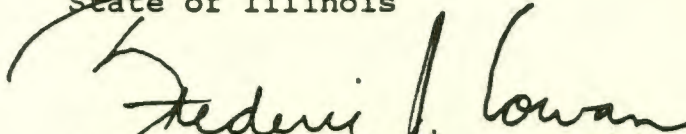

Jim Jones
Attorney General
State of Idaho



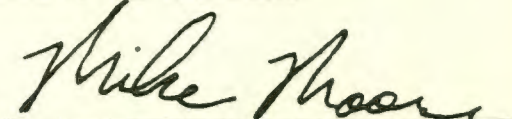
Neil F. Hartigan
Attorney General
State of Illinois



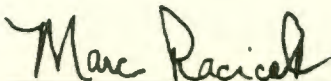
Linley E. Pearson
Attorney General
State of Indiana



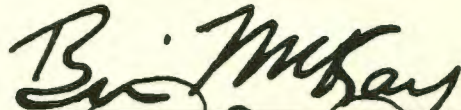
Frederic J. Cowan
Attorney General
State of Kentucky



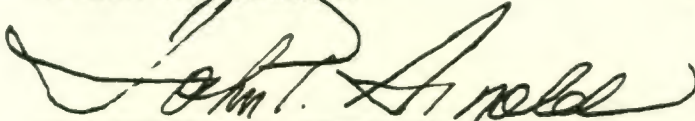
Mike Moore
Attorney General
State of Mississippi



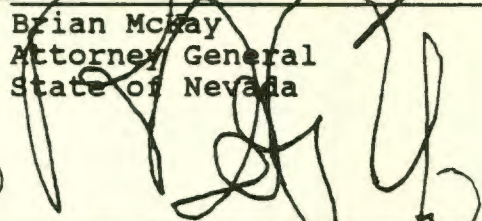
Marc Racicot
Attorney General
State of Montana



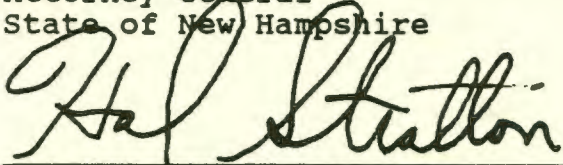
Brian McKay
Attorney General
State of Nevada



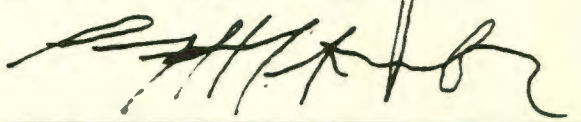
John P. Arnold
Attorney General
State of New Hampshire



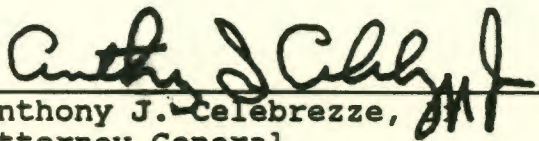
Robert J. Del Tufo
Attorney General
State of New Jersey



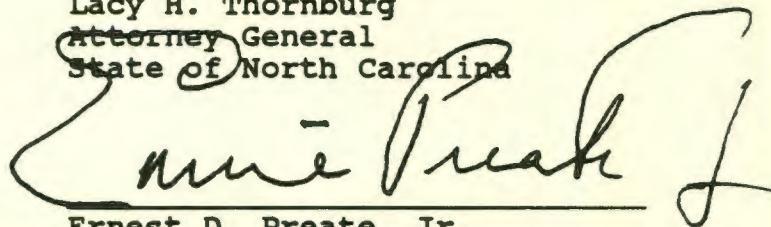
Hal Stratton
Attorney General
State of New Mexico



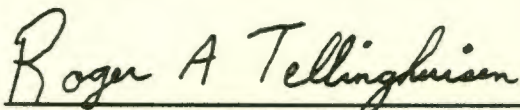
Lacy H. Thornburg
Attorney General
State of North Carolina



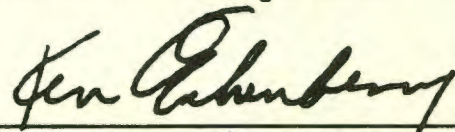
Anthony J. Celebrezze,
Attorney General
State of Ohio



Ernest D. Preate, Jr.
Attorney General
State of Pennsylvania

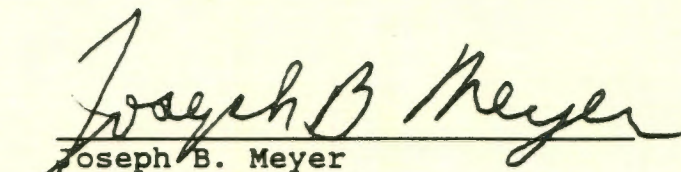


Roger A. Tellinghuisen
Attorney General
State of South Dakota



Kenneth O. Eikenberry
Attorney General
State of Washington

Hon. Jack Brooks
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June 25, 1990



Joseph B. Meyer
Attorney General
State of Wyoming

cc: Rep. Hamilton Fish

2013t

July 3, 1990

Dear General Preate:

It was thoughtful of you to send me a copy of your excellent letter of June 25 to Chief Justice Rehnquist. I am sure he appreciates your support. I assume that you have seen a copy of the report of our committee.

It is good to know that you have met with Senator Specter who holds a rather key position in this debate. If I understand the Kastenmeier proposed changes, they could result in increased repetitive review by federal courts in capital cases.

Sincerely,

Hon. Ernest D. Preate, Jr.
Attorney General
Commonwealth of Pennsylvania
Harrisburg, PA 17120

lfp/ss

cc: The Chief Justice

July 10, 1990

Dear Mr. Carnes,

Thank you for sending me copies of the letters sent to the Chairman of the House Committee on the Judiciary. It is good to know that you have sent a letter from states that do not have capital punishment as well as the separate and longer letter from the Attorney Generals of the states that do have capital punishment statutes.

These are well written and should be helpful to the members of the House Committee who will disagree with Kastenmeier. I must say that his H.R. 4737 would have a serious adverse effect on federal habeas litigation. In addition, it would modify the decisions in Wainwright v. Sykes and Teague v. Lane. The overall effect of Kastenmeier bill would make unprecedented changes in state law.

In view of the interest of The Chief Justice, I am sending him a copy of your letter to me of July 2 and of the two June 25 letters to Chairman Brooks.

Sincerely,

Honorable Edward Carnes
Alabama Assistant Attorney General
Office of The Attorney General
Montgomery, Alabama 36130

LFP/djb

cc: Chief Justice Rehnquist
Honorable Paul H. Roney
Honorable Charles Clark
Honorable William T. Hodges
Honorable Barefoot Sanders

bc: Hew Pate

*File: Civil Hoc Committee ~~on~~
on Federal Habeas Corpus*

DONALD P. LAY
CHIEF JUDGE
P. O. BOX 75908
ST. PAUL, MINNESOTA 55175

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

July 12, 1990

Ad Hoc file

16
JUL 1990

The Honorable Lewis F. Powell, Jr.
Retired Associate Justice
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543

Dear Mr. Justice Powell:

I enclose a letter that I have written to Chief Judge Clark, Chairman of the Executive Committee of the Judicial Conference. I think the entire federal judiciary should be concerned about some of the provisions in the Thurmond-Specter Bill as it affects the administration of the courts.

I am forwarding this to you because of your interest in the matter.

Sincerely yours,

Donald P. Lay
DONALD P. LAY

DPL/ja
Enclosure

DONALD P. CLAY
CHIEF JUDGE
P. O. BOX 75378
ST. PAUL, MINNESOTA 55175

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

July 10, 1990

The Honorable Charles Clark
Chief Judge
United States Court of Appeals
for the Fifth Circuit
245 E. Capitol Street, Room 302
Jackson, Mississippi 39201

Dear Chief Judge Clark:

The Judicial Conference has expressed continuing interest in the Powell Committee Report along with the various studies of outside groups and have recommended procedures to the Congress as it relates to federal habeas corpus involving capital cases.

Several Conference members, including yourself, have appeared before the Senate and the House Judiciary Committee to testify as to various views concerning this report. The Powell Committee Report, as modified by the Judicial Conference, was forwarded to both Senator Biden and Congressman Kastenmeier for study by the respective judiciary committees for both the House and the Senate. As you are aware, on May 24, 1990, the Senate approved a habeas corpus reform bill which is markedly different from the proposal of the Judicial Conference.

It is my understanding that the markup will proceed on the House bill this week and there will probably be a vote on the House bill sometime later this summer. It is also my understanding that the two bills will then go to conference in the latter part of September. Because of the marked changes that are found in Amendment #1687, which is now known as the Thurmond-Specter Bill, and because of the perceived detrimental effect that the provisions of this bill will have on the federal judicial process, I would respectfully request the Executive Committee to place this matter on the agenda for discussion at our September meeting. My concerns do not relate to the substantive merits or differences that we have debated in arriving at the modification of the Powell Committee Report. There are new proposals within the Senate bill which have not received consideration by the Judicial Conference and which, at least in the judgment of many judges and lawyers, contain provisions which are detrimental to both the state and federal judicial process.

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I enclose herewith a copy of the bill taken from the May 23, 1990 Congressional Record. The fundamental areas in which I feel the bill will have a detrimental effect on the administration of the courts are as follows:

1. The bill provides that before a successive petition may be filed in district court in a capital habeas case, the petitioner must obtain authorization from the appropriate circuit court of appeals. This provision of the bill does not specify what standards the appeals courts are to apply in screening the petitions. Presumably a three judge panel will be required to pass on these petitions. In my judgment, this process would be a cumbersome, wasteful, and time consuming burden on all circuit courts of appeals. This process simply adds another layer of judicial involvement to a system we already perceive to be inefficient.
2. The bill would bar claims relying on "opinion" evidence from successive petitions challenging a death sentence. This was inserted in longhand and in the margin in the middle of the Senate debate and apparently was intended to relate to claims that a death row prisoner is, or was, retarded or otherwise disabled.
3. The Senate bill now establishes a 60 day statute of limitation for death penalty cases to run from the appointment of counsel. The bill was obviously drafted in such a hurry that this entire provision is unclear. The 60 day date can be tolled upon petition for certiorari from direct appeal by the State Supreme Court. The essence of this is that the time period is not tolled to pursue state post conviction remedies. In this regard, the bill provides as well that the petitioner shall be deemed to have exhausted all state remedies once he has exercised the right to direct appeal.

The effect of this bill is to eliminate the state post conviction remedy. This provision thus overrules in capital cases the long standing rule of Ex Parte Royal, 117 U.S. 241 (1886) and the requirement of exhaustion of state remedies. See also, 28 U.S.C. § 2254(b)(c). Although some state judges seem to feel this is a good idea because they believe the federal courts provide the ultimate remedy in these cases, this completely overlooks the fundamental premise upon which federal habeas corpus is based. The presumption of validity of findings of fact under § 2254(d) as well as the deference, comity, and finality to state court findings will now be partially obviated. All evidentiary records on post conviction proceedings in capital cases will now be made in

the federal courts. All ineffective assistance of counsel claims will now be addressed exclusively in federal courts. It is fundamental that state criminal procedures are basically concerns of the state courts and should be left in the hands of the state. The narrow overview provided by federal habeas corpus will now be vastly expanded. This could be devastating to the federal work load. The provision which obviates state court post conviction proceedings is perhaps the greatest deficiency in the Senate bill. It can do nothing more than further alienate the state and federal courts.

Justice Powell testified at the House subcommittee hearing that the 60 day provision contained in the Thurmond-Specter Bill was not sufficient time for new counsel to prepare a federal habeas claim. The Senate bill presumes the same counsel will proceed in federal habeas cases that tried the case. This might happen in the perfect world, but it will not happen in capital cases.

4. Of equal concern to the administration of the courts, the Thurmond-Specter Bill imposes drastically curtailed time limits for all levels of federal habeas review. The district court must hear and decide a habeas petition within 110 days after it is filed. The court of appeals must complete its review within 90 days of the filing of the notice of appeal. Finally, the Supreme Court must act within 90 days of the filing of a petition for certiorari. In addition, the time limits for filing a notice of appeal and petition for certiorari have been reduced to 20 days each. It goes without saying that these short limits would wreak havoc on court calendars at all levels of the federal judiciary. There is no provision for relaxing these deadlines and to make matters worse, the Administrative Office of the United States Courts is instructed to report upon compliance. This type of micro-management of the federal courts is somewhat comparable of the original Biden proposal on civil trial management.
5. Finally, the bill contains a rather confusing provision on retroactivity: "In cases subject to this chapter, all claims shall be governed by the law as it was when the petitioner's sentence became final. A court considering a claim under this chapter shall consider intervening decisions by the Supreme Court of the United States which establish fundamental constitutional rights." Obviously, this paragraph is internally inconsistent.

There are many other provisions within the act that are poorly drafted and which totally ignore the thorough considerations which

Hon. Charles Clark
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July 10, 1990

the Powell Committee, the Judicial Conference, and the American Bar Association have given to the bill.

It seems essential to me that the Judicial Conference discuss these provisions and consider a report to the Senate and House conferees so that many of these provisions will not become final law. I would hope that our concerns would result in a joint effort to make our views known as to some of these provisions which seem to me ridiculous on their face.

Perhaps other members of the Judicial Conference would like to make their views known to you and to the Executive Committee. I would respectfully request that this matter be placed on the agenda for discussion at the September meeting.

Sincerely yours,



DONALD P. LAY

DPL/ja

cc: Chief Justice Rehnquist
cc: Members of the U.S. Judicial Conference
cc: Members of the State-Federal Committee of
the Judicial Conference

It is important to point out that the bill is designed to sunset the assault weapon ban 18 months after its effective date. An intensive 18-month study of the impact of the ban is to be undertaken as soon as the ban goes into effect, in order to provide thorough information and answers. The proponents of the ban openly acknowledge that we do not and cannot know the precise effects that a curb on these deadly weapons will have on protecting our citizens and controlling crime in the way that law enforcement officials at every level believe it will. But in my view, we have a moral and social obligation to wage a relentless battle against crime and drugs, and to take decisive action to protect innocent and law-abiding citizens. Through the study, and when the bill must be considered for renewal, we will have the opportunity to thoroughly assess whether a ban on these specific weapons of choice for criminals was effective or whether it should expire.

In conclusion, I wish to underscore my hope that this section of the anti-crime bill will be recognized and respected for what it is—it is an anti-crime, antidrug, antiterrorist, and anti-violence initiative. The ceaseless wave of drugs that has poured into America will not be stemmed unless we mobilize as a country and take extraordinary measures to eliminate this extraordinary threat. Our citizens' right to bear arms is not in peril, but I certainly hope that the ability of criminals and drug criminals to prey on the people and law enforcement officials in my State and throughout America is in grave and immediate danger.

The PRESIDING OFFICER. Under the previous order, the Senator from South Carolina (Mr. THURMOND) is recognized to offer a perfecting amendment regarding title II of the bill. There will be 6 hours of debate on the Thurmond amendment equally divided and controlled by the Senator from South Carolina (Mr. THURMOND), and the Senator from Delaware (Mr. BIDEN) or their designees.

The Senator from Delaware. Mr. BIDEN. Mr. President, as the Chair indicated, there is a 6-hour time limitation on this amendment. What is at stake here is the bill before us now contains a provision relating to habeas corpus, the so-called Biden bill that is sitting at the desk. It has been amended by Senator GRAHAM so that there is now a habeas corpus provision in the legislation sitting before us that will be better known from this point as the Graham-Biden habeas corpus provision.

By unanimous consent, we agreed with our Republican colleagues and the distinguished Senator from South Carolina that he would offer a substitute to that portion of the bill before us, let me explain this to my colleagues, the habeas corpus provision. This will be the only vote on habeas corpus we will have in the entirety of

our debate on this crime bill. This means from now until the time we end this debate on crime, this will be the debate.

There will be no amendments to the substitute about to be offered by my friend from South Carolina. So at some point, hopefully well before 6 hours are up—but that is the time that has been allotted—we will have one vote on whether or not the Graham habeas corpus provision that is in the bill now or the Thurmond-Specter provision which is about to be sent to the desk will prevail. I just wanted to set that out. I now will be delighted to yield the floor to my distinguished friend from South Carolina.

Mr. THURMOND. Mr. President, while Senators are here, and before they will be moving out, I just want to say if they want to end these long appeals, if they really want habeas corpus, they better adopt this amendment.

AMENDMENT NO. 1687

(Purpose: To amend title 28 of the United States Code to provide special habeas corpus procedures in capital cases)

Mr. THURMOND. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from South Carolina (Mr. THURMOND), for himself, Mr. SPECTER, Mr. HATCH, and Mr. SIMPSON, proposes an amendment numbered 1687.

Mr. THURMOND. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

Strike Title Two and insert in lieu thereof the following: "TITLE TWO—HABEAS CORPUS REFORM"

SEC. 1. SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES.

(a) In General.—Part IV of title 28, United States Code, is amended by inserting immediately following chapter 153 the following new chapter:

"CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

"Sec.

"2261. Defendants subject to capital punishment and prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.

"2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions.

"2263. Filing of habeas corpus petition; time requirements; tolling rules.

"2264. Evidentiary hearings; scope of Federal review; district court adjudication.

"2265. Certificate of probable cause (inapplicable).

"2266. Counsel in capital cases; trial and post-conviction standards.

"2267. Law controlling in Federal habeas corpus proceeding; retroactively.

"2268. Habeas corpus time requirements.

"2261. Defendants subject to capital punishment and prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.

"(a) This chapter shall apply—

"(1) to—

"(A) cases in which the defendant is tried for a capital offense; or

"(B) cases arising under section 2254 of this title brought by prisoners in State custody who are subject to a capital sentence; and

"(2) only if subsections (b) and (c) are satisfied.

"(b) This chapter is applicable if a State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable fees and litigation expenses of competent counsel consistent with section 2266 of this title.

"(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State defendants tried for a capital offense and all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

"(1) appointing one or more counsel to represent the defendant or prisoner upon a finding that the defendant or prisoner—

"(A) is indigent and has accepted the offer; or

"(B) is unable competently to decide whether to accept or reject the offer;

"(2) finding, after a hearing, if necessary, that the defendant or prisoner has rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

"(3) denying the appointment of counsel upon a finding that the defendant or prisoner is not indigent.

"(d) No counsel appointed pursuant to subsections (b) and (c) to represent—

"(1) a State defendant being tried for a capital offense; or

"(2) prisoner under capital sentence during direct appeals in the State courts,

shall have previously represented the defendant or prisoner at trial or on direct appeal in the case for which the appointment is made unless the defendant or prisoner and counsel expressly request continued representation.

"(e) The ineffectiveness or incompetence of counsel during State or Federal collateral post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under this chapter of this title. This subsection shall not preclude the appointment of different counsel at any phase of Federal post-conviction proceedings.

"2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions.

"(a) Upon the entry in the appropriate State court of record of an order pursuant to section 2261(c) of this title for a prisoner under capital sentence, a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed pursuant to this chapter. The application must recite that the State has invoked the procedures of this chapter and that the scheduled execution is subject to stay.

"(b) A stay of execution granted pursuant to subsection (a) shall expire if—

"(1) a State prisoner fails to file a habeas corpus petition under this chapter within the time required in section 2263 of this title; or

"(2) upon completion of district court and court of appeals review under this chapter, the petition for relief is denied and—

"(A) the time for filing a petition for certiorari has expired and no petition has been filed;

"(B) a timely petition for certiorari was filed and the Supreme Court denied the petition; or

"(C) a timely petition for certiorari was filed and upon consideration of the case, the Supreme Court disposed of it in a manner that left the capital sentence undisturbed; or

"(3) before a court of competent jurisdiction, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254 of this title, in the presence of counsel and after having been advised of the consequences of making the waiver.

"(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution or grant relief in a capital case unless—

"(1) the basis for the stay and request for relief is a claim not previously presented in the State or Federal courts;

"(2) the failure to raise the claim—

"(A) was the result of State action in violation of the Constitution or laws of the United States;

"(B) was the result of a recognition by the Supreme Court of a new fundamental right that is retroactively applicable; or

"(C) is due to the fact the claim is based on facts that could not have been discovered through the exercise of reasonable diligence in time to present the claim for State or Federal post-conviction review; and

"(3) the filing of any successive petition for a writ of habeas corpus is authorized by the appropriate court of appeals in accordance with section 2264(c) and the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed, or newly discovered facts, which are not based upon or include opinion evidence, expert or otherwise, which would be sufficient to undermine the court's confidence in the validity of the death sentence.

"§ 2263. Filing of habeas corpus petition; time requirements; tolling rules

"(a) Any petition filed under this chapter for habeas corpus relief must be filed in the appropriate district court not later than 60 days after the filing in the appropriate State court of record of an order issued in compliance with section 2261(c) of this title. The time requirements established by this section shall be tolled—

"(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner seeks review of a capital sentence that has been affirmed on direct appeal by the court of last resort of the State or has otherwise become final for State law purposes; and

"(2) during an additional period not to exceed 60 days, if counsel for the State prisoner—

"(A) moves for an extension of time in Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus petition under section 2254 of this title; and

"(B) makes a showing of good cause for counsel's inability to file the habeas corpus petition within the 60 day period established by this section. A court that finds that good cause has been shown shall explain in writing the basis for such a finding.

(b) A notice of appeal from a judgment of the district court in a claim under this chapter shall be filed within 30 days of the entry of judgment.

(c) A petition for a writ of certiorari to the Supreme Court of the United States in a claim under this chapter shall be filed within 30 days of the issuance of the mandate by the court of appeals.

"§ 2264. Evidentiary hearings; scope of Federal review; district court adjudication

"(a) Whenever a State prisoner under a capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court—

"(1) shall determine the sufficiency of the evidentiary record for habeas corpus review; and

"(2) May conduct an evidentiary hearing when the court, in its discretion, determines that such hearing is necessary to complete the record for habeas corpus review.

"(b) Upon the development of a complete evidentiary record, the district court shall rule on the merits of the claims properly before it within the time limits established in section 2268 of this title.

"(c)(1) except as provided in paragraph (2), a district court may not consider a successive claim under this chapter.

"(c)(2) A district court may only consider a successive claim under this chapter if the petitioner seeks leave to file a successive petition in the appropriate court of appeals."

"(c)(3) In a case in which the appropriate court of appeals grants leave to file a successive petition, the time limits established by this chapter shall be applicable to all further proceedings under the successive petition.

"§ 2265. Certificate of probable cause inapplicable

"The requirement of a certificate of probable cause in order to appeal from the district court to the court of appeals does not apply to habeas corpus cases subject to this chapter.

"§ 2266. Counsel in capital cases; trial and post-conviction standards

"(a) A mechanism for the provision of counsel services to indigents sufficient to invoke the provisions of this chapter shall:

"(1) provide for counsel to indigents charged with offenses for which capital punishment is sought, to indigents who have been sentenced to death and who seek appellate or collateral review in state court, and to indigents who have been sentenced to death and who seek certiorari review in the United States Supreme Court; collateral review in State court, and to indigents who have been sentenced to death and who seek certiorari review in the United States Supreme Court.

"(2) provide for the entry of an order of a court of record appointing one or more counsel to represent the prisoner except upon a judicial determination (after a hearing, if necessary) that (A) the prisoner is not indigent; or (B) the prisoner knowingly and intelligently waives the appointment of counsel.

"(b)(1) Except as provided below, at least one attorney appointed pursuant to this chapter before trial, if applicable, and at least one attorney appointed pursuant to this chapter after trial, if applicable, shall have been certified by a statewide certification authority. The States may elect to create one or more certification authorities (but not more than three such certification authorities) to perform the responsibilities set forth below. The certification authority for counsel at any stage of a capital case shall be:

"(i) a special committee, constituted by the State court of last resort or by State

law, relying on staff attorneys of a defender organization, members of the private bar, or both; or

(ii) a capital litigation resource center, relying on staff attorneys, members of the private bar, or both; or

(iii) a statewide defender organization, relying on staff attorneys, members of the private bar, or both.

The certification authority shall:

(iv) certify attorneys qualified to represent persons charged with capital offenses or sentenced to death; and

(v) draft and annually publish procedures and standards by which attorneys are certified and rosters of certified attorneys; and

(vi) periodically review the roster of certified attorneys, monitor the performance of all attorneys certified, and withdraw certification from any attorney who fails to meet high performance standards in a case to which the attorney is appointed; or fails otherwise to demonstrate continuing competence to represent prisoners in capital litigation.

"(2) In a State that has a publicly funded public defender system that is not organized on a statewide basis, the requirements of section 2261(b) shall have been deemed to have been satisfied if at least one attorney appointed pursuant to this chapter before trial shall be employed by a state funded public defender organization, if the highest court of the State finds on an annual basis that the standards and procedures established and maintained by such organization (which have been filed by such organization and reviewed by such court on an annual basis) ensure that the attorneys working for such organization demonstrate continuing competence to represent indigents in capital litigation.

"(c) If a State has not elected to establish one or more statewide certification authorities to certify counsel eligible to be appointed before trial to represent indigents, in the case of an appointment made before trial, at least one attorney appointed under this chapter must have been admitted to practice in the court in which the prosecution is to be tried for not less than 5 years, and must have not less than 3 years' experience in the trial of felony prosecutions in that court.

(d) If a State has not elected to establish one or more statewide certification authorities to certify counsel eligible to be appointed after trial to represent indigents, in the case of an appointment made after trial, at least one attorney appointed under this chapter must have been admitted to practice in the court of last resort of the State for not less than 5 years, and must have had not less than 3 years' experience in the handling of appeals in that State courts in felony cases.

"(e) Notwithstanding this subsection, a court, for good cause, may appoint another attorney whose background, knowledge or experience would otherwise enable the attorney to properly represent the defendant, with due consideration of the seriousness of the possible penalty and the unique and complex nature of the litigation.

"(f) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or issues relating to sentence, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefor, under subsection (g). Upon finding that timely procurement of such services could not practically await prior authorization, the court may authorize the

provision of any... services none
pro lone.

"(g) The court... compensation
to be paid to... State employ-
ees) and the fees... to be paid
for investigative... and other reason-
ably necessary services authorized under
subsection (c), at such rates or amounts as
the court determines to be reasonably neces-
sary to carry out the requirements of this
subsection.

"§ 2267. Law controlling in Federal habeas corpus
proceedings; retroactivity

"In cases subject to this chapter, all
claims shall be governed by the law as it was
when the petitioner's sentence became final.
A court considering a claim under this chap-
ter shall consider intervening decisions by
the Supreme Court of the United States
which establish fundamental constitutional
rights.

"§ 2268. Habeas corpus time requirements

"(a) A Federal district court shall deter-
mine any petition for a writ of habeas
corpus brought under this chapter within
110 days of filing.

"(b) The court of appeals shall hear and
determine any appeal of the granting,
denial, or partial denial of a petition for a
writ of habeas corpus brought under this
chapter within 90 days after the notice of
appeal is filed.

"(c) The Supreme Court shall act on any
petition for a writ of certiorari in a case
brought under this chapter within 90 days
after the petition is filed.

"(d) The Administrative Office of United
States Courts shall report annually to Con-
gress on the compliance by the courts with
the time limits established in this section."

(b) AMENDMENT TO TABLE OF CHAPTERS.—
The table chapters for part IV of title 28,
United States Code, is amended by inserting
after the item for chapter 153 the following:

"154. Special habeas corpus proce-
dures in capital cases..... 2261".

(c) AMENDMENT TO SECTION 2254 OF TITLE
28.—Section 2254(c) of title 28, United
States Code, is amended by—

(1) striking "An applicant" and inserting
"(1) Except as provided in paragraph (2), an
applicant"; and

(2) adding at the end thereof the follow-
ing:

"(2) An applicant in a capital case shall be
deemed to have exhausted the remedies
available in the courts of the State when he
has exhausted any right to direct appeal in
the State."

Mr. THURMOND. Mr. President, I
rise today to offer, along with Senator
SPECTER, a tough habeas corpus
reform proposal which strikes at the
heart of our Nation's habeas corpus
problem—delay. Delay, delay, that is
what is taking place. This amendment,
which is cosponsored by Senator
HATCH and Senator SIMPSON, would
strike the habeas reform proposal con-
tained in the Biden bill, which ex-
pands death row inmates rights, and
replace it with a new proposal which
appropriately addresses the need to es-
tablish a definite timeframe for Federal
consideration of death penalty
cases. This proposal was arrived at
after consultation with several mem-
bers of the Judiciary Committee and
embodies a consolidation of the Powell
habeas corpus proposal contained in
my substitute and an amendment
drafted by Senator SPECTER.

Although I have introduced another
habeas proposal which the Attorney
General and I believe to be preferable,
S. 88, I have decided to offer this
amendment which will effectively end
abuse of the habeas procedure. The
issue of habeas corpus reform has lin-
gered in Congress for several years
and we must act. After conferring with
a number of Senators and experts in
this area, I am convinced that this
proposal warrants adoption by this
body and is vastly superior to the pro-
posal pending in S. 1970.

This Nation is facing a crisis in its
criminal justice system. Federal
habeas corpus and collateral attack
procedures are in dire need of reform.
This is evidenced by the glut of habeas
petitions in the Federal system. In ad-
dition, Federal courts have proven to
be slow in their action on and, in some
cases, willingness to act upon habeas
petitions. The large increases in the
number of habeas corpus filings, many
of which are frivolous and used as a
delaying tactic, and the inordinate
length of time death row inmates
spend litigating in the Federal system,
require that legislation be enacted to
reform habeas corpus.

Habeas petitions have grown by vast
numbers in recent years. In 1941,
State prisoners filed 127 habeas corpus
petitions in the Federal district courts.
By 1961, that figure had risen to 1,020.
Over the years, that number has con-
tinued to rise with Federal district
courts receiving an incredible 9,880
habeas petitions in 1983. The problem
of these numerous filings is com-
pounded by the extraordinary delay in
habeas corpus filings and court action.
With respect to delay on the part of
our Federal courts, a witness who tes-
tified at a recent Judiciary Committee
died a habeas corpus case he was in-
volved with where the Federal court
took 3 years to decide on one habeas
petition. The result of these related
problems is years of delay between
sentencing and a final judicial resolu-
tion and imposition of the death sen-
tence.

The Thurmond-Specter amendment
is based, in substantial part, upon the
recommendations of the Ad Hoc Com-
mittee on Federal Habeas Corpus in
Capital Cases chaired by former Asso-
ciate Supreme Court Justice Lewis
Powell. This committee, commonly re-
ferred to as the Powell Committee,
was formed by Chief Justice William
Rehnquist in June 1983. The Powell
committee was charged with inquiring
into the necessity and desirability of
legislation directed toward avoiding
delay and the lack of finality in capital
cases in which the prisoner had been
offered counsel. Pursuant to the Chief
Justice's request, the Powell commit-
tee made its recommendations and
proposed a legislative remedy to the
problem of habeas corpus review in
capital cases.

Mr. President, this amendment in-
corporates the Powell committee rec-
ommendations and proposes new stat-

tutory procedures for Federal habeas
corpus review of capital sentences. It is
aimed at achieving the following goals:
death penalty cases should be subject
to one complete and fair course of col-
lateral review in the State and Federal
system, free from the time pressure of
impending execution, and with the as-
sistance of competent counsel for the
defendant. Once this appropriate, fair
review is completed, the criminal pro-
cess should be brought to a conclusion.

This proposal allows a State to bring
death penalty litigation by its prison-
ers within the new statute by provid-
ing competent counsel for inmates at
trial and on State and Federal habeas
corpus review. Participation in the
new procedures is optional with the
States. This legislation also provides
for a 60-day period within which a
Federal habeas petition must be filed.
This 60-day period begins to run on
the appointment of counsel. In addi-
tion, this legislation provides for an
automatic stay of execution, which is
to remain in place until Federal
habeas proceedings are completed.
This provision ensures that habeas
claims not be considered by a court
under the time pressure of an impend-
ing execution. Every claim raised by a
death row inmate will be subject to
one full and complete review.

Mr. President, where this amend-
ment mostly differs from the underly-
ing bill, S. 1970, and provides effective,
true reform is that it establishes a
timetable for completion of Federal
habeas corpus appeals. The delay in
carrying out our Nation's death sen-
tences has brought our judicial system
into disrepute. Families of victims are
forced to suffer, year after year, while
murders sit on death row. Cases in-
volving capital punishment have
dragged through the courts for as long
as 18 years. The vast majority of this
delay is spent in Federal court. This
amendment would, for the first time,
establish a definite timetable for com-
pletion of Federal habeas corpus cases
within 1 year from the time the death
sentence becomes final in State court.
It would bypass State habeas corpus
proceedings which currently involve so
much delay. Yet, prisoners would still
be permitted to pursue State habeas
while proceeding through the Federal
system. The essential aspects of the
timetable are that:

First, Federal habeas petitions must
be filed within 60 days of the final
action in the State court proceeding
resulting in the death penalty.

Second, a final decision must be
made on the claim by the U.S. district
court within 110 days from the filing
of the habeas corpus petition.

Third, a final decision must be made
by the U.S. Court of Appeals within 90
days after the final judgment of the
U.S. district court.

Fourth, final action on a grant or
denial of certiorari by the Supreme
Court of the United States must be

July 16, 1990

Dear Don:

Thank you for the copy of your letter to Charles Clark about the Thurmond-Specter Bill. I have not had an opportunity to read the bill as I am in Richmond during July and August. I also have a small office at the federal court there.

You and I are not together on the subject of federal habeas corpus. As Circuit Justice for CA11 and previously for CA5, I personally have witnessed the extent to which this writ is abused in capital cases.

Perhaps you have read that I personally oppose capital punishment, and have said so publicly a number of times.

I hope the weather in St. Paul is not quite as hot as it is in D.C., and in our home of Richmond.

Sincerely,

Hon. Donald P. Lay
Chief Judge
U.S. Court of Appeals for the
Eighth Circuit
P. O. Box 75908
St. Paul, Minnesota 58175

lfp/ss

cc: The Chief Justice
Hon. Charles Clark

MEMORANDUM

TO: Justice Powell July 18, 1990
FROM: George
RE: S. 1970, Sec. 201, Version 2

I received a copy of the most recent version of Senate Bill 1970, Section 201 from Justice Kennedy's chambers. They instructed me to send you a copy which I enclose with this memo. I also made a copy of Sec. 201 for our files here. Please call me if I can do anything else for you.

center, or Federal halfway house;

"(2) the term 'term of life imprisonment' means a sentence for the term of natural life, a sentence commuted to natural life, an indeterminate term of a minimum of at least fifteen years and a maximum of life, or an unexecuted sentence of death; and

"(3) the term 'murders' means committing first degree or second degree murder as defined by section 1111 of this title."

(b) AMENDMENT TO CHAPTER ANALYSIS.-The chapter analysis for chapter 51 of title 18, United States Code, is amended by adding at the end thereof the following:

"1118. Murder by a Federal prisoner."

SEC. 201. SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES.

(a) IN GENERAL.-Part IV of title 28, United States Code, is amended by inserting immediately following chapter 153 the following new chapter:

"CHAPTER 154-SPECIAL **HABEAS** CORPUS PROCEDURES IN CAPITAL CASES

"Sec.

"2261. Defendants subject to capital punishment and prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.

"2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions.

"2263. Filing of **habeas** corpus petition; time requirements; tolling

rules.

"2264. Evidentiary hearings; scope of Federal review; district court adjudication.

"2265. Certificate of probable cause inapplicable.

"2266. Counsel in capital cases; trial and post-conviction standards.

"2267. Law controlling in Federal **habeas** corpus proceedings; retroactivity.

"2268. **Habeas** corpus time requirements.

"2261. Defendants subject to capital punishment and prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

"(a) This chapter shall apply-

"(1) to-

"(A) cases in which the defendant is tried for a capital offense; or

"(B) cases arising under section 2254 of this title brought by prisoners in State custody who are subject to a capital sentence; and

"(2) only if subsections (b) and (c) are satisfied.

"(b) This chapter is applicable if a State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable fees and litigation expenses of

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competent counsel consistent with section 2266 of this title.

"(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State defendants tried for a capital offense and all State prisoners under capital sentence and must provide for the entry of an order by a court of record-

"(1) appointing one or more counsel to represent the defendant or prisoner upon a finding that the defendant or prisoner-

"(A) is indigent and has accepted the offer; or

"(B) is unable competently to decide whether to accept or reject the offer;

"(2) finding, after a hearing, if necessary, that the defendant or prisoner has rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

"(3) denying the appointment of counsel upon a finding that the defendant or prisoner is not indigent.

"(d) No counsel appointed pursuant to subsections (b) and (c) to represent-

"(1) a State defendant being tried for a capital offense; or

"(2) prisoner under capital sentence during direct appeals in the State courts,

shall have previously represented the defendant or prisoner at trial or

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on direct appeal in the case for which the appointment is made unless the defendant or prisoner and counsel expressly request continued representation.

"(e) The ineffectiveness or incompetence of counsel during State or Federal collateral post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under this chapter of this title. This subsection shall not preclude the appointment of different counsel at any phase of Federal post-conviction proceedings.

"2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

"(a) Upon the entry in the appropriate State court of record of an order pursuant to section 2261(c) of this title for a prisoner under capital sentence, a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed pursuant to this chapter. The application must recite that the State has invoked the procedures of this chapter and that the scheduled execution is subject to stay.

"(b) A stay of execution granted pursuant to subsection (a) shall expire if-

"(1) a State prisoner fails to file a **habeas** corpus petition under this chapter within the time required in section 2263 of this title; or

1990 S. 1970 JULY 6, 1990 -- VERSION: 2

"(2) upon completion of district court and court of appeals review under this chapter, the petition for relief is denied and-

"(A) the time for filing a petition for certiorari has expired and no petition has been filed;

"(B) a timely petition for certiorari was filed and the Supreme Court denied the petition; or

"(C) a timely petition for certiorari was filed and upon consideration of the case, the Supreme Court disposed of it in a manner that left the capital sentence undisturbed; or

"(3) before a court of competent jurisdiction, a State prisoner under capital sentence waives the right to pursue **habeas** corpus review under section 2254 of this title, in the presence of counsel and after having been advised of the consequences of making the waiver.

"(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution or grant relief in a capital case unless-

"(1) the basis for the stay and request for relief is a claim not previously presented in the State or Federal courts;

"(2) the failure to raise the claim-

"(A) was the result of State action in violation of the Constitution or laws of the United States;

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"(B) was the result of a recognition by the Supreme Court of a new fundamental right that is retroactively applicable; or

"(C) is due to the fact the claim is based on facts that could not have been discovered through the exercise of reasonable diligence in time to present the claim for State or Federal post-conviction review; and

"(3) the filing of any successive petition for a writ of **habeas** corpus is authorized by the appropriate court of appeals in accordance with section 2264(c) and the facts underlying the claim would be sufficient, if proved, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed or newly discovered facts which are not based upon or include opinion evidence, expert or otherwise, which would be sufficient to undermine the court's confidence in the validity of the death sentence.

"2263. Filing of **habeas** corpus petition; time requirements; tolling rules

"(a) Any petition files under this chapter for **habeas** corpus relief must be filed in the appropriate district court not later than 60 days after the filing in the appropriate State court of record of an order issued in compliance with section 2261(c) of this title. The time requirements established by this section shall be tolled-

"(1) from the date that a petition for certiorari is filed in the

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Supreme Court until the date of final disposition of the petition if a State prisoner seeks review of a capital sentence that has been affirmed on direct appeal by the court of last resort of the State or has otherwise become final for State law purposes; and

"(2) during an additional period not to exceed 60 days, if counsel for the State prisoner-

"(A) moves for an extension of time in Federal district court that would have jurisdiction over the case upon the filing of a **habeas** corpus petition under section 2254 of this title; and

"(B) makes a showing of good cause for counsel's inability to file the **habeas** corpus petition within the 60-day period established by this section. A court that finds that good cause has been shown shall explain in writing the basis for such a finding.

(b) A notice of appeal from a judgment of the district court in a claim under this chapter shall be filed within 20 days of the entry of judgment.

(c) A petition for a writ of certiorari to the Supreme Court of the United States in a claim under this chapter shall be filed within 20 days of the issuance of the mandate by the court of appeals.

"2264. Evidentiary hearings; scope of Federal review; district court adjudication

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"(a) Whenever a State prisoner under a capital sentence files a petition for **habeas** corpus relief to which this chapter applies, the district court-

"(1) shall determine the sufficiency of the evidentiary record for **habeas** corpus review; and

"(2) may conduct any requested evidentiary hearing when the court, in its discretion determines that such hearing is necessary to complete the record for **habeas** corpus review.

"(b) Upon the development of a complete evidentiary record, the district court shall rule on the merits of the claims properly before it within the time limits established in section 2268 of this title.

"(c)(1) Except as provided in paragraph (2), a district court may not consider a successive claim under this chapter.

"(c)(2) A district court may only consider a successive claim under this chapter if the petitioner seeks leave to file a successive petition in the appropriate court of appeals.

"(c)(3) In a case in which the appropriate court of appeals grants leave to file a successive petition, the time limits established by this chapter shall be applicable to further proceedings under the successive petition."

"2265. Certificate of probable cause inapplicable

"The requirement of a certificate of probable cause in order to appeal

from the district court to the court of appeals does not apply to **habeas** corpus cases subject to this chapter except when a second or successive petition is filed.

"2266. Counsel in capital cases; trial and post-conviction standards

"(a) A mechanism for the provision of counsel services to indigents sufficient to invoke the provisions of this chapter shall-

"(1) provide for counsel to indigents charged with offenses for which capital punishment is sought, to indigents who have been sentenced to death and who seek appellate or collateral review in state court, and to indigents who have been sentenced to death and who seek certiorari review in the United States Supreme Court; collateral review in State court, and to indigents who have been sentenced to death and who seek certiorari review in the United States Supreme Court; and

"(2) provide for the entry of an order of a court of record appointing one or more counsel to represent the prisoner except upon a judicial determination (after a hearing, if necessary) that (A) the prisoner is not indigent; or (B) the prisoner knowingly and intelligently waives the appointment of counsel.

"(b)(1) Except as provided below, at least one attorney appointed pursuant to this chapter before trial, if applicable, and at least one attorney appointed pursuant to this chapter after trial, if applicable,

shall have been certified by a statewide certification authority. The State may elect to create one or more certification authorities (but not more than three such certification authorities) to perform the responsibilities set forth below. The certification authority for counsel at any stage of a capital case shall be-

"(i) a special committee, constituted by the State court of last resort or by State law, relying on staff attorneys of a defender organization, members of the private bar, or both; or

"(ii) a capital litigation resource center, relying on staff attorneys, members of the private bar, or both; or

"(iii) a statewide defender organization, relying on staff attorneys, members of the private bar, or both.

The certification authority shall-

"(iv) certify attorneys qualified to represent persons charged with capital offenses or sentenced to death; and

"(v) draft and annually publish procedures and standards by which attorneys are certified and rosters of certified attorneys; and

"(vi) periodically review the roster of certified attorneys, monitor the performance of all attorneys certified, and withdraw certification from any attorney who fails to meet high performance standards in a case to which the attorney is appointed; or fails otherwise to demonstrate continuing competence to represent prisoners

in capital litigation.

"(2) In a State that has a publicly-funded public defender system that is not organized on a state-wide basis, the requirements of section 2261(b) shall have been deemed to have been satisfied if at least one attorney appointed pursuant to this chapter before trial shall be employed by a state funded public defender organization, if the highest court of the State finds on an annual basis that the standards and procedures established and maintained by such organization (which have been filed by such organization and reviewed by such court on an annual basis) ensure that the attorneys working for such organization demonstrate continuing competence to represent indigents in capital litigation.

"(c) If a State has not elected to establish one or more statewide certification authorities to certify counsel eligible to be appointed before trial to represent indigents, in the case of an appointment made before trial, at least one attorney appointed under this chapter must have been admitted to practice in the court in which the prosecution is to be tried for not less than 5 years, and must have not less than 3 years' experience in the trial of felony prosecutions in that court.

"(d) If a State has not elected to establish one or more statewide certification authorities to certify counsel eligible to be appointed after trial to represent indigents, in the case of an appointment made

after trial, at least one attorney appointed under this chapter must have been admitted to practice in the court of last resort of the State for not less than 5 years, and must have had not less than 3 years' experience in the handling of appeals in that State courts in felony cases.

"(e) Notwithstanding this subsection, a court, for good cause, may appoint another attorney whose background, knowledge or experience would otherwise enable the attorney to properly represent the defendant, with due consideration of the seriousness of the possible penalty and the unique and complex nature of the litigation.

"(f) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or issues relating to sentence, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefor, under subsection (g). Upon finding that timely procurement of such services could not practically await prior authorization, the court may authorize the provision of any payment of services nunc pro tunc.

"(g) The court shall fix the compensation to be paid to an attorney appointed under this subsection (other than State employees) and the fees and expenses to be paid for investigative, expert, and other reasonably

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necessary services authorized under subsection (c), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of this subsection.

"2267. Law controlling in Federal **habeas** corpus proceedings; retroactivity

"In cases subject to this chapter, all claims shall be governed by the law as it was when the petitioner's sentence became final. A court considering a claim under this chapter shall consider intervening decisions by the Supreme Court of the United States which establish fundamental rights.

"2268. **Habeas** corpus time requirements

"(a) A Federal district court shall determine any petition for a writ of **habeas** corpus brought under this chapter within 110 days of filing

"(b) The court of appeals shall hear and determine any appeal of the granting, denial, or partial denial of a petition for a writ of **habeas** corpus brought under this chapter within 90 days after the notice of appeal is filed.

"(c) The Supreme Court shall act on any petition for a writ of certiorari in a case brought under this chapter within 90 days after the petition is filed.

"(d) The Administrative Office of United States Courts shall report annually to Congress on the compliance by the courts with the time limits

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established in this section."

"(b) AMENDMENT TO TABLE OF CHAPTERS.-The table of chapter for part IV of title 28, United States Code, is amended by inserting after the item for chapter 153 the following:

"154. Special **habeas** corpus procedures in capital cases 2261".

(c) AMENDMENT TO SECTION 2254 OF TITLE 28.-Section 2254(c) of title 28, United States Code, is amended by-

(1) striking "An applicant" and inserting "(1) Except as provided in paragraph (2), an applicant"; and

(2) adding at the end thereof the following:

"(2) An applicant in a capital case shall be deemed to have exhausted the remedies available in the courts of the State when he has exhausted any right to direct appeal in the State."

TITLE III-USE OF FIREARMS IN CRIMES OF VIOLENCE AND DRUG TRAFFICKING
CRIMES

SEC. 301. INCREASED MANDATORY MINIMUM SENTENCES WITHOUT RELEASE FOR
CRIMINALS USING FIREARMS AND OTHER VIOLENT CRIMINALS.

Section 924(c)(1) of title 18, United States Code, is amended to read as follows:

"(c)(1)(A) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

JUL 23 1990

July 19, 1990

(601) 353-0911

✓
CHARLES CLARK
CHIEF JUDGE
245 EAST CAPITOL STREET, ROOM 302
JACKSON, MISSISSIPPI 39201

Ad Hoc Committee
File

The Hon. Lewis F. Powell, Jr.
Associate Justice of the Supreme Court (Retired)
c/o Clerk, Fourth Circuit Court of Appeals
10th and Main Streets
Richmond, Virginia 23219

Dear Lewis:

Thanks for the copy of your note to Don Lay and the comment about Richmond's summer weather. Jackson had a scorching last half of June and first half of July, then last Saturday it turned delightfully cool and dry. We are still enjoying it, though they say today is the last day we will. I was looking back through some old Judicial Conference papers and noted where in about 1946 they created a committee on air conditioning of court buildings. This may be the most worthwhile committee ever formed by the Conference.

Back to habeas corpus for a moment -- I cannot get over how naive I was when we started our work. It was my firm conviction that we had to be very careful to protect the interests of the states in the reforms we structured. Even at the end of our processes I thought Congress would balk at some of the state burdens we proposed be created. When Don Lay and the others at the Conference went overboard, I figured they had torpedoed our efforts because Congress would be outraged. Now I find the U.S. Senate has voted to abolish state collateral review! Where has reason fled? At least 90% of all collateral review corrections of trial court violation of the federal Constitution are the result of state court action. Are we also to take on the job of correcting violations of state constitutional and statutory law? The erroneous notion that state judges are not as smart or well-intentioned as federal judges has been repeated so often the U. S. Senate accepts it as gospel truth.

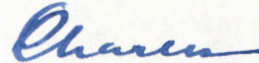
yes

The Hon. Lewis F. Powell, Jr.
July 19, 1990
Page 2

I hear that Congressman Kastenmeier may agree to requiring state funding of trial counsel under federal standards and bypassing state collateral review, and may also throw a spear or two of his own. It looks as though we have let a very evil genie out of the bottle in suggesting Congress correct habeas corpus abuses.

Emy joins me in sending our best regards to you and Jo.

Sincerely,

A handwritten signature in blue ink, appearing to read "Charlene", is written on a light-colored rectangular piece of paper.

P.S.: We were with Sherwood and Tay Wise last week at the State Bar Meeting. We spoke warmly of you both.

Ad Hoc File
With Atty General
Thornburgh's letter to
Chairman Brooks

TALKING POINTS ON TEAGUE v. LANE AND
RETROACTIVITY ON FEDERAL HABEAS CORPUS

of July 19, 1990

-- Teague v. Lane may be the most important decision of the Supreme Court in the area of law enforcement since the good faith exception to the exclusionary rule was announced in United States v. Leon. Both state prosecutors and the Department of Justice agree that any alteration of the retroactivity rules established in Teague would be a giant step backward in criminal law enforcement. Despite these facts, every so-called "reform" package offered by the Democratic side repeals Teague and replaces it with ad hoc rules of retroactivity sure to cause additional needless delay in habeas corpus proceedings.

--- In Teague and subsequent cases, the Supreme Court adopted a solution to the retroactivity problem long advocated by Justices Harlan and Powell. Under this view, all new criminal law decisions are automatically retroactive on direct review -- that is throughout the appellate process and up to and including the disposition of one petition for certiorari filed with the Supreme Court. On the other hand, new decisions are presumed not to apply to defendants who have exhausted their appeals and subsequently file federal habeas corpus petitions.

-- As Justice Powell recently put it in testimony before the House subcommittee on crime, the Teague approach to retroactivity "represents the common sense idea that a prisoner should not be able, years after the fact, to challenge his sentence on the basis of law that was not on the books at the time of his crime, trial or appeal."

-- Chairman Brooks habeas corpus "reform" proposals contained in Title XIII of H.R. 5269, and other Democratic proposals would overrule the Court's decision in Teague and replace the Harlan/Powell approach to retroactivity with what in essence is a totality of the circumstances test for determining retroactivity. Under the Brooks bill new rules would apply on habeas corpus unless the Court determined that application of the rule on habeas would "fail to serve the purpose of the new rule," would "upset State authorities' reasonable reliance on a different rule," and "would seriously disrupt the administration of justice."

-- The Brooks proposal to overrule Teague would actually increase delay in capital cases (which already stands at almost seven years from sentence to execution). It would also lead to

the same fairness problems which plagued retroactivity decisions before Teague: some defendants would receive the benefit of new decisions, while others would not, with no rhyme or reason to the process.

-- Under the Brooks proposal, the writ of habeas corpus is effectively reconstituted as an endless "time machine". For example, a defendant properly tried and convicted of murder in 1980 could succeed in delaying the execution of his sentence for a decade, and then simply enter his habeas corpus time machine to argue that his conviction is contrary to a new Supreme Court decision issued in May 1990. Under the Brooks proposal no conviction is ever final, it can constantly be reopened by a new decision of the Supreme Court. The effect is what Justice Powell called the virtual nullification of the death penalty laws of 37 States.

-- In Chairman Brook's home state of Texas, in 1988 34 persons were convicted of first degree murder and sentenced to death, yet only three executions occurred in his state in 1988. At the end of 1988 Texas had 284 prisoners on death row. The death penalty has been effectively nullified in Texas. People are sentenced to death by juries and they are sent to death row, but they are very rarely executed. Anti-death penalty forces have successfully used the habeas corpus retroactivity rules to frustrate the execution of constitutional and lawful sentences in Texas. Chairman Brook's "reform" proposals would only increase the delay, thus assuring that a penalty which the vast majority of Texans, and Americans, support, will never be enforced.

-- The Brooks proposal, and other Democratic proposals, go beyond overruling Teague, and overrule several recent Supreme Court decisions concerning what constitutes a "new rule" for purposes of retroactivity. In the recent cases of Butler v. McKellar, and Saffle v. Parks, the Court indicated that where a new decision is not dictated by prior precedent, State courts would not be penalized on habeas corpus for failure to "predict" the new rule. H.R. 5269, and the other Democratic side habeas "reform" proposals overrule Butler and Saffle, by defining new law as "a sharp break from precedent."

-- The potential for additional delay in such "reforms" system is obvious. Under the Brooks proposal, convicted murders can point to even the most trivial changes in Supreme Court precedent as grounds for a new stay of execution, and a new habeas corpus hearing, years after they were convicted and sentenced by State courts who faithfully followed the law at the time of conviction and sentencing.

-- The Brooks proposal offends sound notions of federalism. State court judges are told that no matter how careful they are, no matter how fully and fairly they protect federal rights existing at the time of the defendant's trial, no conviction is

final because they may have failed to predict future Supreme Court decisions. As Justice O'Connor noted in her opinion for the Court in Engle v. Isaac, 456 U.S. 107, 128, n. 33 (1982): "State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas corpus] proceeding, new constitutional commands." Under Teague state courts are given every incentive to fairly apply existing constitutional guarantees. The Brooks bill and other Democratic side reform proposals demand that State courts actually predict future Supreme Court decisions on pain of the release of criminal defendants years after their trials.

-- It should be noted that the Judicial Conference, which amended Justice Powell's recommendations in several respects, nonetheless rejected an amendment similar to those proposed by House Democrats to reverse Teague. Thus, even those judges who disagree with some aspects of habeas reform, realized that Teague worked a positive change in the law in terms of both finality and fairness.

-- Before its decision last Term in Teague v. Lane, 109 S. Ct. 1060 (1989), the Supreme Court applied an ad hoc balancing test to determine whether it would give retroactive effect to decisions establishing new criminal procedure requirements. This approach created substantial unfairness in that often similarly situated defendants were treated differently -- some defendants receiving the benefit of the new decision -- others not -- with no discernible principle separating the two classes. Not only does the Brook's proposal increase delay, it resurrects this ad hoc system where similarly situated habeas petitioners are treated differently.

-- The Teague rule of nonretroactivity on habeas corpus is tempered by two exceptions designed to ensure that no injustice occurs. First, all newly recognized constitutional rules that prohibit the punishment of certain conduct or prohibit the infliction of a certain punishment for a certain crime are given retroactive effect. In addition, all new rules which significantly enhance the truth-seeking process of criminal trials will be retroactively applied to prisoners on habeas corpus.

With Atty General
Thornburg's letter to
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United States District Court

MIDDLE DISTRICT OF FLORIDA
UNITED STATES COURTHOUSE
TAMPA, FLORIDA 33602

3 AUG 1990

WM. TERRELL HODGES
JUDGE

July 31, 1990

*File: Ad
Hoc Committee*

Honorable Bob Graham
United States Senator
241 Dirksen Senate Office Building
Washington, DC 20510-0903

Dear Senator:

Thank you for your letter of July 18, 1990, asking for my comments concerning the habeas corpus reform provisions of S. 1970. I am happy to respond, but I am obliged to note that my views are solely my own and do not necessarily express the opinion of any other judge, the Judicial Conference of the United States, or the Powell Committee.

In your remarks to the Senate you pointed out the central differences between your proposed amendment and the one offered by Senator Thurmond, and I have organized my comments by focusing upon the same points. As you will see, except for a couple of suggestions, I tend to favor your proposal in each instance.

1. Exhaustion of State remedies.

While your proposal makes no explicit reference to the exhaustion requirements of §2254(b), it seems clear from the interaction of §§ 2257(c) and 2258(b)(2), coupled with your remarks on the floor, that the exhaustion requirement would be preserved by your amendment. This was also the approach taken in the Powell Committee recommendation; but I note that your proposal omitted §2259 of the Bill recommended by the Powell Committee (entitled Evidentiary Hearings; Scope of Federal Review, etc.). The reason for this omission is not apparent to me, and you may wish to consider adding that provision to your proposal in order to strengthen the retention of the exhaustion requirement as well as the procedural default preclusion (embodied in your §2257(c)) of successive petitions asserting claims not previously raised "in State or Federal courts. . ."

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In any event, the Thurmond amendment expressly dispenses with the exhaustion requirement in capital habeas cases, and excludes from the time-of-filing requirements any tolling period measured by the time the case is pending in the state courts on post conviction collateral review proceedings.

I agree with you, as expressed in your floor remarks, that retention of the exhaustion requirement in capital habeas cases is vital to the promotion of federalism and comity which support the delicate balance between our dual systems for the administration of justice, state and federal; and it is precisely in these cases in which federalism and comity presently have the greatest need for nurture because it is these very cases which are now producing the point of greatest friction between the two systems. Moreover - - and of even greater practical importance in this context - - the elimination of the requirement of exhaustion of state remedies will not, in my opinion, accomplish the intended object of expediting the overall process. In fact, it may have just the opposite effect for the reasons that follow.

One claim that is now litigated in every case is a Sixth Amendment, ineffective assistance of counsel claim relating to the performance of both trial and appellate counsel. Of course, by the very nature of the claim, it is never made on direct appeal and is only raised for the first time in the collateral proceedings. Also, the nature of the claim is such that an evidentiary hearing is more likely to be required (i.e., matters such as the extent of counsel's preparation or the availability of unused alibi witnesses, etc., cannot be decided on the record of the trial alone.)¹ State trial court judges, by my observation and experience, have become diligent, prompt and thorough in their handling of necessary evidentiary hearings in habeas cases; and, once the litigation reaches the federal District Court, we are not only entitled to rely upon the record of those hearings, we are required to give deference to the state court's findings of fact by §2254(d). See Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764

¹ Claims concerning an alleged non-production by the prosecution of so-called Brady or exculpatory material is another kind of claim which is frequently made for the first time in the habeas phase of the litigation and often requires an evidentiary hearing to resolve.

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(1981). It is also important to note that the state trial judge is, more often than not, in a much better position to conduct hearings and make findings on these issues because he or she was the judicial officer who presided over the trial and observed the challenged conduct of counsel; and, more to the point here, the state trial judge is much more likely to be in a position to schedule and conduct the hearing almost immediately due to the availability of time on the calendar and ready access to the existing record. As a result of this procedure, in all of the capital habeas cases coming before me, only a handful have required evidentiary hearings in this court. If exhaustion of post conviction collateral remedies in the state courts is dispensed with, it would necessarily mean that the conduct of evidentiary hearings in virtually every case would simply be shifted from state to federal court, and, rather than expediting such proceedings, I predict that even more time would be consumed and the interests of comity and federalism will have been sacrificed for nothing. (It would also substantially increase the burden on a federal system which is already overtaxed).

Finally, to the extent that dispensing with exhaustion would result in parallel proceedings going forward in both the state and federal courts at the same time (or sequentially with the proceeding in state court coming afterward rather than before), there would, in many cases, be a waste of judicial time and labor on the federal side. While I cannot cite hard statistical data for this - - though I'm sure it could be obtained from the various states - - there are a significant number of cases in which some measure of relief is granted in state habeas proceedings so that the case never reaches federal court at all, or, if it does progress to federal court, the issues presented are narrowed in scope and/or the record producing them is better developed than would have been true if the case had come to federal court first.

2. Time of Filing requirement.

Your proposal as I read it would require (or permit) filing of the habeas petition in federal court within 365 days after the appointment of counsel, with that period being tolled (1) during the time the case is pending in the Supreme Court on certiorari following direct appeal; (2) during the time the case is pending in the state courts on collateral review and in the Supreme Court on petition for certiorari;

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and (3) during an additional 90 days which may be granted by the District Court on a showing of good cause.

I pause to point out one problem here which stems, I believe, from a difference between your proposal and the Powell Committee report which you apparently used as a general model or guide. Your provision (§2260) requires, as a precondition to the application of the statute, the appointment of counsel at trial as well as for purposes of post conviction appellate or collateral review. The Powell Committee report dealt with the appointment of counsel only in the post conviction collateral review stage; and, therefore, the time of filing requirement was triggered by the appointment of that counsel with tolling afforded for the time then spent in state court exhausting remedies before coming to federal court. If, however, counsel is to be appointed under this statutory scheme for trial, then, I suggest, you will need to consider either (1) changing the triggering device for the running of the habeas time-of-filing requirement to the completion of the trial and any proceedings on direct review, and/or the appointment of separate counsel for post conviction collateral proceedings, or (2) provide an additional tolling provision for the time taken by trial and appeal. Otherwise, given a literal application of your proposal as it stands, the 365 day filing period for the federal habeas proceeding would begin to run before trial and would not be tolled by the time taken for trial or any direct appeal.

The Thurmond amendment presents the same problem and allows only 60 days from the appointment of counsel for the filing of the federal habeas petition. That period is then tolled only while the case is pending in the Supreme Court on certiorari following direct review.

I respectfully suggest that the Thurmond period is entirely too short, and that your provision for 365 days is too long. I suggest that 365 days is too long when you consider that, under your proposal, (1) new competent counsel must be appointed for post conviction review at the outset of the state habeas proceeding; (2) the filing period is tolled during the pendency of the state habeas proceeding, including any appeals; and, most importantly with respect to this point, (3) the federal court petition may only include those claims presented to the state court. Under that progression, therefore, the case must be fully prepared long before it reaches federal court, and the allowance of any substantial

yes

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period of time between the end of the state habeas proceeding and the commencement of the federal proceeding seems unnecessary.² It was for that reason that the Powell Committee settled on a period of 180 days (or six months) and I still favor that resolution.

Conversely, the Thurmond provision is much too short, especially if no exhaustion is required in state court (and no tolling is afforded for state court habeas proceedings). That would mean that new counsel would have to review the record and prepare the case from scratch in less than two months from the date of appointment. I think the states will find it impossible to recruit counsel in such circumstances. Again, I suggest the 180 day period as the preferable time to be allowed.

I would also suggest a modification of the tolling scheme embodied in §2258(b)(2) of your proposal. Under that provision as it stands the tolling period would continue, not only during the state court collateral review litigation, but during any certiorari proceedings in the Supreme Court as well.

Under the present state of affairs, a capital habeas petitioner gets his case to the Supreme Court at least three times: (1) upon completion of his appeal or direct review in the state courts; (2) upon completion of collateral review or habeas proceedings in the state courts; and (3) upon completion of collateral review or habeas proceedings in the federal courts. Under the Powell Committee report (Section 2258 of the Powell Committee's proposed bill) no tolling was allowed for any time taken by the second of these proceedings before the Supreme Court, i.e., certiorari following the state court habeas litigation. The Powell Committee explained this position as follows:

² I recognize that some of the time would expire up front after the appointment of counsel and before the tolling effected by commencement of the state court habeas litigation; and, for that reason, the federal time-of-filing provision necessarily encourages prompt initiation of the state collateral review proceedings as well. Even so, a full year for the commencement of those proceedings seems generous.

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Under section 2258(a), the 180 day period is tolled when a state prisoner files a petition for certiorari in the Supreme Court after affirmance of his capital sentence on direct appeal to the state court of last resort. It is extremely important to recognize, as section 2258(b) makes clear, that there is no comparable tolling rule to permit the filing of certiorari petitions after state post-conviction review. The Committee believes that multiple opportunities for Supreme Court review are not essential to fairness in the consideration of capital cases. In this vein, it would point out that of the 106 capital cases in which the Supreme Court has granted certiorari since 1972, only 2 came to the Court from state post-conviction review. Elimination of this step does not result in disadvantage to the state prisoner, since all issues raised in state post-conviction review can be carried forward in a section 2254 petition and ultimately presented to the Supreme Court.

3. Time of Decision requirement.

Section 2268 of the Thurmond amendment requires that the District Court decide all capital habeas cases within 110 days of filing; that the Court of Appeals decide any appeal within 90 days after the notice of appeal is filed; and that the Supreme Court act on any petition for certiorari within 90 days after the petition is filed. Significantly, however, as pointed out in your remarks on the floor, the bill is silent with regard to the consequences of any failure to comply with those requirements - - no sanctions are specified. Is it intended that the petition be deemed to be granted if not decided within the time allowed? Surely not; but it would be equally bizarre to think that such a petition must be deemed to be denied if not decided within that time. One is forced to conclude, therefore, that there is no consequence flowing from a violation - - that the statute is precatory in nature - - and such a provision is likely to accomplish very little except to create a new field for contention and litigation, a result that is entirely counterproductive in relation to the goals of its proponents.

Let me also suggest that these time constraints are unnecessary. I realize the existence of a widely held perception that inordinate delay occurs in the federal courts. This results primarily from the fact that it is the federal

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courts which are called upon, after the case has been pending in the state systems for several years, to stay scheduled executions at the eleventh hour following exhaustion of state remedies. The truth is, however, as statistics gathered by the Powell Committee demonstrated, that most of the capital habeas cases pend in the federal courts for a much shorter period of time than they do in the state systems.³

The Thurmond amendment (§2268(d)) requires the Administrative Office of the United States Courts to make annual reports to Congress concerning compliance. I would respectfully suggest, building on that idea, that the provisions of that section requiring action within stated time periods be deleted, and that the A.O. should be required to make annual reports concerning the time actually taken by the federal courts in disposing of these cases. Then, if actual experience demonstrates a need, Congress can revisit the subject and tailor a provision, perhaps, with specific priorities and/or sanctions responsive to that demonstrated need.

4. Retroactivity of new Constitutional principles.

Your proposal, as I read it - - §2255A - - is apparently intended to overrule Teague v. Lane, _____ U. S. _____, 109 S.Ct. 1060 (1989), and codify the pre-Teague retroactivity standard of Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731 (1965).

³ I do not mean by this observation to point fingers at the state courts. On the contrary, as previously mentioned, the state court proceedings should require more time given the opportunity for both direct and collateral review, and the obligation to conduct any necessary evidentiary hearings. I mean only to make the point that, in fact, contrary to what many suppose, capital habeas proceedings are not languishing unattended in the District Courts. The delay occurs before the case ever gets to federal court, i.e., there is no incentive for a petitioner to proceed with his collateral remedies until the death warrant is issued; and, of course, that is the central issue addressed by this legislation. To go further and establish precatory time limits after the case reaches federal court would accomplish nothing except, as previously noted, the creation of a new field of litigation and endless posturing by the parties.

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The Thurmond amendment (§2267), quite frankly, is an enigma to me. The second sentence seems to be a contradiction of the first sentence, and I cannot make out what is intended vis-a-vis the rule of Teague vs. Lane or otherwise.

In any event, this issue involves a policy choice about which I have reservations as to whether it would be appropriate for me to make any specific recommendation. I would urge, however, that if the Thurmond amendment goes forward, it should be clarified on this point before final passage.

5. Leave to File Successive Petitions.

Both your proposal (§2257) and the Thurmond amendment (§2262) substantially track the Powell Committee recommendation and narrowly circumscribe the entertainment of successive petitions except in three clearly defined situations. The Thurmond amendment goes one step further, however, and requires that leave to file a successive petition must first be sought and obtained from the Court of Appeals.

I recognize that the intent of this added requirement is to insure that successive petitions are not manipulated as frivolous instruments of delay, but I suggest that such a requirement may well be counterproductive in relation to that object.

The exceptions which permit a successive petition entail, in some respects, a fact intensive inquiry, i.e., is the claim ". . . based on a factual predicate that could not have been discovered [earlier] through the exercise of reasonable diligence[?]" Courts of Appeal by their nature are ill equipped, and are therefore loathe, to resolve factual disputes. I foresee a distinct likelihood, therefore, that in many cases an application seeking leave to file a successive petition in the District Court based on alleged, newly discovered facts will be referred in the first instance to the District Court for its findings on the factual predicate of the application, thence back to the Circuit Court, thence (if leave is allowed) back to the District Court for consideration on the merits, thence back to the Circuit Court again; and, further, if leave was allowed by the Court of Appeals, there is a greater likelihood that the District Court will grant a certificate of probable cause for appeal at the end of the process than might otherwise have been the

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case if the District Court had considered the petition in the first instance and determined it to be meritless. In short, getting the Court of Appeals involved up front in the handling of successive petitions may well undermine and subvert the very object of that proposal. I suggest, accordingly, that you may want to consult members of the Courts of Appeals concerning this point.

I hope you find these comments helpful and, of course, I will try to answer any questions you may have concerning any of this material.

Warm personal regards.

Cordially,



Wm. Terrell Hodges

August 6, 1990

Dear Terry,

Thank you for the copy of your letter of July 31 to Senator Graham. Your letter is timely as I have not yet had an opportunity carefully to review Senator Graham's proposal.

Your letter should be helpful to Senator Thurmond and other members of the Senate Judiciary Committee. As you noted, the Thurmond proposal for the most part adopts our Committee's recommendations.

My guess is that with elections in November, and Congress now in adjournment for four weeks, no action will be taken on habeas corpus reform at the current session of Congress.

I am sending copies of your thoughtful letter to other members of our committee and to The Chief Justice. I am sitting on CA 11 September 19 and 20, and hope to see you then.

Sincerely,

Honorable Wm. Terrell Hodges
United States District Court
United States Courthouse
Tampa, Florida 33602

LFP/djb

cc: The Chief Justice
Committee Members, Roney, Clark, Sanders & Pearson

bc: R. Hewitt Pate, III, Esquire

DONALD P. LAY
CHIEF JUDGE
P. O. BOX 75908
ST. PAUL, MINNESOTA 55175

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

August 6, 1990

10 AUG 1990

The Honorable Lewis F. Powell, Jr.
Retired Associate Justice
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543

Dear Justice Powell:

I have just returned home from our Eighth Circuit Judicial Conference in Kansas City and received your good letter. I wish you could have been at our Conference this year. We invited the State Supreme Court Justices from the seven states within the circuit as our guests. I was privileged to moderate a panel of Chief Justices of the seven states on federal-state relations. In the 25 years I have been on the court, it is the most positive step we have taken in cementing relations and having a better understanding of federal-state problems.

The proposed elimination of the state post conviction review by the Thurmond-Specter bill can only lead to further resentment in federal-state relations. I do hope that you would have an opportunity to review the bill and let the Conference know your views on it.

I regret the disagreement with your position and with those of us who sought to modify the Powell Committee Report at the time of the Conference. My main concern at the time of the Conference was the absence of competent counsel at the state trial level. I still have that concern but it would appear the congressional bill has now taken care of that problem. I hope that you will not find in our disagreement any lack of respect for either you or Chief Justice Rehnquist. I teach a small seminar on the Supreme Court at the University of Minnesota and I have long held out the two of you as being two of my heroes on the court.

Hope you are having a good summer. With kind personal regards.

Sincerely yours,

DONALD P. LAY

DPL/ja
cc: Chief Justice Rehnquist

August 22, 1990

Dear Don,

Your letter of August 6 was forwarded to me here in Richmond where Jo and I have kept a home, and where also I have Chambers in the federal court. The Clerk's Office of CA4 is here, and as you know I sit from time to time on that Court.

I certainly agree with you that competent counsel at the state as well as federal habeas level is essential to the fairness of our system. Perhaps our difference is that rather than prescribe a standard that some states simply couldn't meet, the committee I chaired left this issue to the states. This was a close call with me.

I can assure you, Don, that our disagreement in this respect does not in any way detract from my admiration of you. I feel somewhat at home in St. Paul. West Publishing Company is headquartered there and Dwight Opperman has long been a friend of mine, as he is of yours.

Whenever you are at the Supreme Court where I have my principal Chambers, it would give me pleasure if you came in to see me.

Sincerely,

Honorable Donald P. Lay
Chief Judge, United States Court of Appeals
for the Eighth Circuit
P.O. Box 75908
St. Paul, Minnesota 55175

LFP/djb

REMARKS BY PRESIDENT GEORGE BUSH TO STATE ATTORNEYS GENERAL
WHITE HOUSE ROSE GARDEN/ WEDNESDAY, SEPTEMBER 12, 1990
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dest=swh,mwh,doj,fbi,fns10000,drug,crime,narenf
data

PRESIDENT BUSH: Thank you all very much. Please be seated and please take off your coats. I mean, it's a little warm out here in the Rose Garden.

Well, thank you, Attorney General Thornburgh and US attorneys, state attorneys general. I see our Director of the FBI here and local district attorneys, and other law enforcement officials. I am just delighted to have this opportunity to welcome our nation's prosecutors to the White House.

I know that you spent the morning over at [the Department of] Justice with Dick Thornburgh -- we just -- I just got briefed on that -- discussing the legal changes that we need to help you do your jobs more effectively. And I know that other subjects are preoccupying all of us these days, but I repeat today what I said last week. Drugs and violent crime remain a top priority. And on behalf of all the American people I want to thank you, all of you, for working to help us take back the streets. We -- (applause) -- know full well that the life of a prosecutor is not easy. For gifted hardworking lawyers like yourselves, the financial sacrifice is immense.

And more importantly, over the past 30 years, America's criminal justice system has become bogged down with technicalities that stymie our prosecutors' simple goals, to see the truth come out, the guilty punished, the law upheld, and justice done. Too many times, in too many cases, too many criminals go free because the scales of justice are unfairly loaded against dedicated lawmen and women like you.

Since taking office, we've worked with many of you to try to steady the scales of justice, to seek a fair balance between the legitimate rights of criminals and criminal suspects and society's right to protect itself from evil predators. And America took an important step towards balancing these scales when I had the chance to name a tough, fair-minded, intellectually brilliant judge as my first nominee to the Supreme Court, New Hampshire's judge David Souter. (Applause.)

With a decade of law enforcement experience prior to being elevated to the bench, Judge Souter comes from your own ranks. The Senate starts these confirmation hearings tomorrow, and I call on them to act swiftly so that he can take his place as the only career prosecutor on the Court -- (applause) -- in time for the Court's first sitting. (Applause continues.)

And, of course, I am very pleased -- all of us are pleased -- that the American Bar Association gave him their highest rating by a unanimous vote, and we're especially pleased that the National

REMARKS BY PRESIDENT GEORGE BUSH TO STATE ATTORNEYS GENERAL
WHITE HOUSE ROSE GARDEN/ WEDNESDAY, SEPTEMBER 12, 1990
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District Attorneys Association endorsed Judge Souter for the Supreme Court, praising him as "a tough anti-crime judge." This is a group that knows all too well the problems with the criminal justice system that all too often simply doesn't work.

And that's why I stood before the Capitol on a rainy day in May last year, and many of you were there, calling on Congress to pass legislation to give our prosecutors and police the tools they need to fight back against the epidemic of violent crime still raging in America. That was over a year ago, and despite the urgency of the problem, the Congress has failed to act on key aspects of my proposal. What's worse, several measures receiving serious consideration in the House this week would actually weaken law enforcement and hamper your efforts to protect the citizens of this nation.

But your presence here today sends a powerful warning to Congress, a shot across the bow of a ship that is moving in the wrong direction. We will not accept a crime bill that is tougher on law enforcement than it is on criminals. (Applause.)

We need a crime bill that will stop the endless abuse of habeas corpus, that guarantees that criminals who use serious weapons face serious weapons charges and serious time, and that ensures that evidence gathered by good cops acting in good faith isn't barred by technicalities that let bad people go free. And for the most unspeakable of crimes, we do need a workable death penalty, which is to say a real death penalty. (Applause.)

I simply will not accept anything that rolls back the clock on America's ability to fight crime and punish wrongdoers. The bottom line is really this: I will not sign a crime bill that handcuffs the police. (Applause.) I will not sign a bill that overturns recent Supreme Court decisions limiting frivolous habeas corpus petitions, that expands the coverage of the exclusionary rule, or that creates a racial quota system for capital punishment. (Applause.)

You know the difference between my proposals, which give you the legal tools you need to win this fight, and the anti-law enforcement proposals that some in the Congress are attempting to peddle as a crime bill.

For the past two weeks America's been gripped by chilling headlines that tell of kids going back to school in bulletproof coats and a visiting Utah man -- a kid, really -- sports lover -- killed while defending his mother from a New York subway gang said to be after pocket money so they could go dancing.

The American people really are fed up. You knew this -- you know this perhaps better than I, because you're on the front line -- but they're fed up. And I urge the Congress to heed the voices of our people, our police and our prosecutors, and send me a crime bill that will help take back the streets.

REMARKS BY PRESIDENT GEORGE BUSH TO STATE ATTORNEYS GENERAL
WHITE HOUSE ROSE GARDEN/ WEDNESDAY, SEPTEMBER 12, 1990
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I want to thank you --

(Applause.)

I really wanted to have this meeting and so did Dick so that both of us here in the majesty of the Rose Garden, in the shadow of the White House, we could tell you that we are grateful to you. And we know it's not easy, but keep up your dedicated efforts to make our community safe. We're lucky, America is lucky to have men and women of your quality and your character out doing the job for all of us.

Thank you and God bless you and God bless our great country.
Thank you very much.

END

Andrew McBride
left this with me

Congress of the United States
House of Representatives
Washington, DC 20515

September 13, 1990

Ad Hoc
Committee on
Fed. Habeas
Corpus

SUPPORT HUGHES AMENDMENT TO THE RACIAL JUSTICE ACT

Dear Colleague:

We all agree that no one should be executed under a death sentence imposed on the basis of race. The Judiciary Committee has reported a provision in its crime bill that was intended to ferret out racial discrimination in capital sentencing. The provision in the bill, however, has some serious problems, and could be read as creating a presumption of racial bias.

To address these problems while also ensuring that statistical evidence can be used in death cases -- as it is in other cases -- to raise an inference of discrimination, an amendment will be offered to modify the racial justice provisions.

Unlike the bill as reported, the Hughes amendment does not provide that a prima facie case of racial discrimination is established by a mere showing of significant racial disparity in the imposition of the death penalty.

The Hughes substitute merely provides that such evidence is to be considered. The government may challenge the validity and significance of the statistics at any point. However, it is only after the court determines that the evidence is valid and that it supports an inference that race is influencing death sentences does the government incur an obligation to respond and to rebut the inference.

Under the amendment, a court would not be required to accept any particular statistical analysis or theory.

The Hughes amendment expressly requires that a defendant's evidence must compare similar cases, and take into account the statutory aggravating factors in the cases being compared.

The amendment requires that a defendant's evidence be specific to the jurisdiction that imposed his death sentence and to the time at which his sentence was imposed.

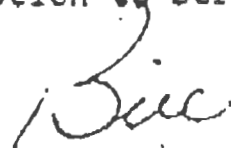
Unlike the bill as reported, the amendment does not limit the grounds on which the state may rebut the statistical showing.

The amendment lowers the state's burden of proof on rebuttal, from "clear and convincing" to "preponderance of the evidence."

By expressly requiring the death penalty defendant to analyze cases similar to his own, the amendment ensures that there will be no inference of racial discrimination in cases falling in the category of highly aggravated cases that show no discriminatory pattern.

We support the death penalty. It is clear that, with the Hughes amendment, the racial justice provisions will not abolish the death penalty. They will give a person an opportunity to use statistical proof, as it is used in other types of cases, to raise an inference of discrimination.

We urge you to support the Hughes amendment and oppose the motion to strike.


William J. Hughes
Chairman
Subcommittee on Crime

Hamilton Fish, Jr.
Ranking Member
Committee on the Judiciary

Title XIII of Crime Bill: Habeas Corpus ReformI. General

- Title 13 is a tough but fair habeas reform package
- Hughes/Kastenmeier substitute represents substantial toughening of original subcommittee bill. Took into account at least 14 major items of concern to state AG's and DA's.
- The title addresses the problem of abuse and excessive delay in habeas process while also maintaining fairness and ensuring role of federal courts in vindication of federal rights.

II. What the bill does

- creates a uniform system across the country rather than a patchwork opt-in system
- for the first time, specific time limits are established for the filing of federal habeas corpus petitions in state capital cases
- the bill limits a defendant's ability to present successive petitions to very narrow circumstances that go to either guilt or the legal validity of the death sentence
- provides for the appointment of competent counsel at every stage of capital litigation for indigent defendants. This alone will reduce the number and length of habeas petitions because inept counsel is the basis for a large number of claims
- prevents defendants from raising claims in federal court that were not raised in state court first (procedural default) unless they can show cause and prejudice for not raising the claim. Does not penalize the defendant because of the ignorance or neglect of his counsel but does not allow defense to "sandbag."
- repeals the excessively narrow ruling of the Supreme Court in Teague v. Lane and restores the law of retroactivity to where it had been for almost twenty years prior to February 1989. Thus, under certain narrow circumstances, significant changes in the law announced by the U.S. Supreme Court can be applied retroactively so that defendants who were convicted in a manner now known to be improper are not executed solely because of the date of their conviction.
- retains current law requiring exhaustion of claims in state court before they can be addressed in federal court.

What's Wrong with the Hyde Amendment?

The Powell Committee's provisions are optional. If states don't opt in:

1. There would be no statute of limitations. There would be no limits on when a prisoner can file a habeas corpus petition. (The Hughes-Kastenmeier provision, in every case, cuts off petitions that are not filed within one year.)
2. There would be no limit on the number of petitions that can be filed. The filing of multiple petitions is one of the principal reasons there is no finality under current law, and executions are delayed. (The Hughes-Kastenmeier provision, in every case, and except in extraordinary situations, prevents prisoners from filing more than one petition.)
3. There would be no competent counsel at trial. Unqualified lawyers at trial are the biggest cause of wasteful appeals, retrials, and resentencings. (The Hughes-Kastenmeier provision, in every case, requires competent counsel at trial.)

Even if a state did opt in, the Hyde amendment:

1. would not require competent lawyers at trial or on appeal. They would only be required in state postconviction proceedings. The amendment deletes the U.S. Judicial Conference amendment to the Powell Committee report. (The Hughes-Kastenmeier provision requires competent lawyers at trial, on appeals, and in state postconviction proceedings. Hughes-Kastenmeier follows the advice of the Judicial Conference and the ABA.)
2. does not specify standards for counsel. A state could appoint a recent law school graduate, and the federal courts would have nothing to say about it. (The Hughes-Kastenmeier provision uses the ABA standards for counsel.)
3. would permit someone to be executed despite the fact that the death sentence was imposed based on knowingly perjured testimony. Again, this ignores the Judicial Conference amendment that challenges to the validity of a death sentence must be permitted. (Hughes-Kastenmeier would prohibit this.)
4. would prevent courts from getting to the merits. (Hughes-Kastenmeier eliminates needless procedural hurdles, allowing courts to reach the merits and dispose of cases promptly.)
5. eliminates habeas corpus by prohibiting virtually all petitions unless there is no difference of opinion about the claim. (Hughes-Kastenmeier limits habeas corpus, but does not eliminate it.)
6. would create a patchwork of laws from state to state. Federal circuits will have to apply different laws depending on

Hughes Amendment to Death Penalty Procedures

This amendment would make three changes to the procedures utilized to determine whether the death penalty should be imposed in a case in which an offense charged is punishable by death. These procedures are found in Section 212 of Title XI of H.R. 5269.

The first change would reduce the number of aggravating factors that must be found by the sentencer in order to impose the death penalty from two to one. The second would change the standard by which a mitigating factor can be found from "any evidence" to a "preponderance of the evidence." Finally, the third change regards the effect of a finding by an appellate court that one or more aggravating factors found are invalid or unsupported by the evidence. At present the bill requires the appellate court to vacate the death sentence and remand the case to the trial court for resentencing proceedings. This amendment would require the appellate court to sustain the sentence if at least one aggravating factor remains and that factor or factors substantially outweighs any mitigating factor or factors.

III. Major changes made by Hughes/Kastenmeier substitute

- application of time limits for filing petitions toughened: broad exception eliminated
- tolling of time limits tightened: no tolling during certiorari petition of denial of state collateral relief
- tightening of circumstances under which successive petitions would be considered
- procedural default toughened: court must dismiss if no cause and prejudice for failure to raise claim in state court
- criteria for qualifications of counsel were relaxed making it much easier for states to develop pool of qualified counsel
- sanctions for failure to comply with counsel provisions only apply if state substantially fails to comply
- no changes in current exhaustion doctrine
- federal court not to consider the "appropriateness" of the death sentence, only its "validity under federal law"

IV. Major Problems with Proposed Hyde Amendment

- Allows states to decide whether or not to "opt-in" to the system thus creating a checkerboard of applicable law and standards for counsel
- states must appoint qualified counsel only for state collateral proceedings and each state can set its own standards. (Trial is where the problems are.)
- By forbidding a successive petition that addresses the validity of the death sentence it will allow execution of a defendant despite the uncovering of new information that proves that the defendant should not be executed.
- penalizes defendant for an ignorant or neglectful mistake of his lawyer while not ensuring that qualified counsel is appointed

What's Wrong with the Hyde Amendment?

The Powell Committee's provisions are optional. If states don't opt in:

1. There would be no statute of limitations. There would be no limits on when a prisoner can file a habeas corpus petition. (The Hughes-Kastenmeier provision, in every case, cuts off petitions that are not filed within one year.)
2. There would be no limit on the number of petitions that can be filed. The filing of multiple petitions is one of the principal reasons there is no finality under current law, and executions are delayed. (The Hughes-Kastenmeier provision, in every case, and except in extraordinary situations, prevents prisoners from filing more than one petition.)
3. There would be no competent counsel at trial. Unqualified lawyers at trial are the biggest cause of wasteful appeals, retrials, and resentencings. (The Hughes-Kastenmeier provision, in every case, requires competent counsel at trial.)

Even if a state did opt in, the Hyde amendment:

1. would not require competent lawyers at trial or on appeal. They would only be required in state postconviction proceedings. The amendment deletes the U.S. Judicial Conference amendment to the Powell Committee report. (The Hughes-Kastenmeier provision requires competent lawyers at trial, on appeals, and in state postconviction proceedings. Hughes-Kastenmeier follows the advice of the Judicial Conference and the ABA.)
2. does not specify standards for counsel. A state could appoint a recent law school graduate, and the federal courts would have nothing to say about it. (The Hughes-Kastenmeier provision uses the ABA standards for counsel.)
3. would permit someone to be executed despite the fact that the death sentence was imposed based on knowingly perjured testimony. Again, this ignores the Judicial Conference amendment that challenges to the validity of a death sentence must be permitted. (Hughes-Kastenmeier would prohibit this.)
4. would prevent courts from getting to the merits. (Hughes-Kastenmeier eliminates needless procedural hurdles, allowing courts to reach the merits and dispose of cases promptly.)
5. eliminates habeas corpus by prohibiting virtually all petitions unless there is no difference of opinion about the claim. (Hughes-Kastenmeier limits habeas corpus, but does not eliminate it.)
6. would create a patchwork of laws from state to state. Federal circuits will have to apply different laws depending on

whether a state had opted in or not.

Justice Powell was testifying about a different bill when he said it would cause "increased delay, piecemeal litigation, and more last minute appeals." Justice Powell was not talking about the Hughes-Kastenmeier provision, that addressed Justice Powell's concerns.



U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

17 SEP 1990

September 14, 1990

*Ad Hoc
Committee
Feb*

The Honorable Lewis F. Powell, Jr.
Associate Justice (Retired)
United States Supreme Court
Washington, D.C. 20543

Dear Justice Powell:

It was, as always, a pleasure to speak with you today. I enclose for your information an editorial piece by my boss, Deputy Attorney General Barr. Also enclosed is the President's Rose Garden speech to state and local prosecutors on the crime bill, which addresses the habeas corpus reform.

With God's help and a little political luck, the habeas corpus reform you worked so hard on will become a reality. We all thank you for your herculean efforts in this regard.

My best to Sally and all in the Powell chambers.

Sincerely,

Andrew G. McBride
Associate Deputy Attorney General

Enclosures

PERSPECTIVE ON CAPITAL PUNISHMENT

Wolves Fighting Crime Go 'B-a-a-a'



It's one thing to oppose the death penalty, another to pretend support while erecting rules to thwart it.

By WILLIAM BARR

The House of Representatives is poised to take a major step backward in the fight against violent crime. In a bill purporting to be an anti-crime measure, the House Judiciary Committee has sent to the floor a proposal that would effectively abolish the death penalty in this country.

An overwhelming majority of Americans believe that the death penalty is a just punishment for the most heinous crimes. Thirty-six states have adopted capital punishment. Yet, for more than a decade, these laws have been rendered almost unenforceable by a system that allows convicted murderers to delay indefinitely, and ultimately to avoid, imposition of their sentences. After exhausting all appeals, murderers are allowed to file endless *habeas corpus* petitions in state and federal courts, raising largely technical challenges to their convictions and sentences.

The writ of *habeas corpus* originally was a legal device used to challenge attempts by the government to seize and detain an individual without trial. During the Warren Court era, the writ was converted into a right to multiple appeals of issues already decided. This radical expansion of the scope of *habeas corpus* has allowed inmates sentenced to death to nullify their sentences through strategic delay.

As of 1988, the average delay from time of sentencing to time of execution of a capital sentence was almost seven years. In that same year 296 individuals were convicted of first-degree murder and sentenced to death while only 11 capital sentences were actually carried out. Obviously, such delay undermines the deterrent and retributive force of the death penalty and breeds frustration and

disrespect for our criminal justice system.

The case of Robert Alton Harris illustrates the point. In 1978, while on parole for voluntary manslaughter, Harris shot two teen-age boys to steal their car for a robbery. Later, he confessed to the murders. He was convicted of first-degree murder and sentenced to death by a California jury in 1979. In 1981, the California Supreme Court upheld this conviction and sentence, finding that "none of the many contentions raised by [Harris] has merit." Since that time, Harris has filed several state and four federal *habeas* petitions, each of which has been rejected. His sentence has still

First, the House proposal rejects the Powell Committee's *quid pro quo* principle. It affirmatively encourages the filing of successive *habeas corpus* petitions containing claims unrelated to guilt or innocence. It also imposes requirements for state-appointed counsel that few lawyers can meet and even fewer state taxpayers can afford. Under the House plan, convicted murderers like Harris would go on avoiding punishment by raising alleged technical "defects" in their sentences—"defects" that have nothing to do with their guilt or innocence.

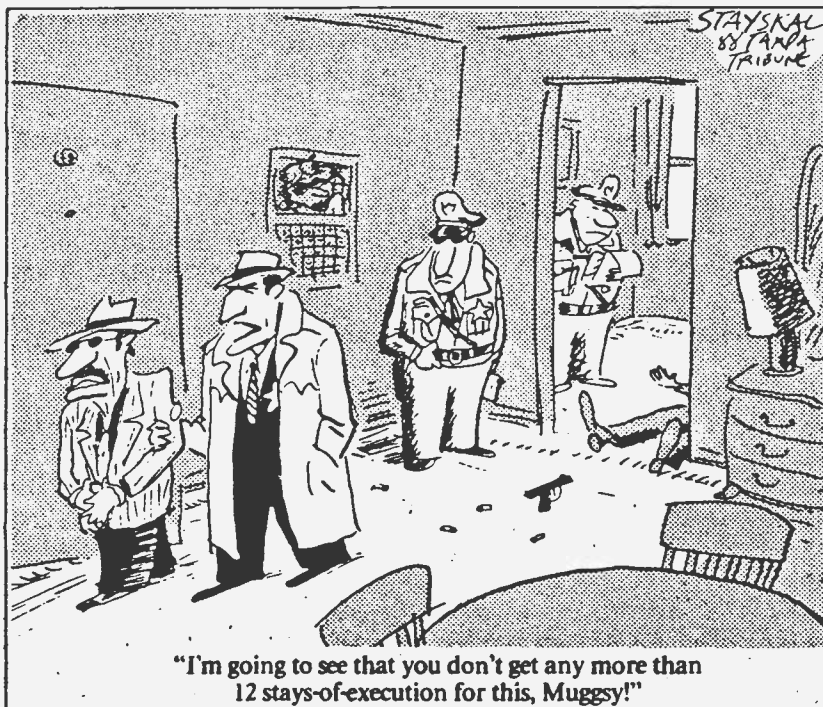
Second, the House proposal overrules two recent Supreme Court decisions that attempt to provide some reasonable safeguards against *habeas corpus* abuse. In

Teague vs. Lane, the Supreme Court held that prisoners cannot use *habeas corpus* to challenge their convictions based on judicial decisions that were not even rendered at the time of their trial and appeals. The House proposal overrules *Teague*, and thus renders every criminal conviction in the nation subject to constant challenge based on cases that have not yet even been decided. The Judiciary Committee proposal also overrules the court's decision in *Wainwright vs. Sykes*. The *Sykes* decision requires that defendants follow state procedural rules in order to preserve claims for federal review, thus preventing criminal defendants from "sandbagging," that is, from holding back their

claims in state court only to raise them years later in a federal proceeding. The House proposal would effectively reward defendants who ignore state procedural rules.

It is one thing to openly and honestly oppose the death penalty outright—a position the American people have rejected. It is another thing entirely to proclaim support for the death penalty in order to curry political favor while at the same time voting to erect a labyrinth of procedural rules to prevent the penalty from ever being applied. This crime bill is a sheep in wolf's clothing.

William Barr is deputy attorney general of the United States.



not been carried out.

A panel of jurists chaired by retired Justice Lewis F. Powell Jr. has offered a solution to this problem. If a state provides those on Death Row with counsel at state expense in state *habeas corpus* proceedings, the prisoner will get only two "bites at the apple"—one state proceeding and one full federal review. No further *habeas corpus* petitions could be filed unless a claim of factual innocence were raised. The Bush Administration, the National Assn. of Attorneys General and the National District Attorneys Assn. support the principles behind Justice Powell's reform proposals. The House bill, far from curing present abuses, would make matters worse.

September 17, 1990

Dear General Thornburgh:

It has come to my attention that some confusion has arisen concerning the relationship between the proposals of the Ad Hoc Committee on Habeas Corpus reform which I chaired, H. R. 4737 (known as Kastenmeier proposal) and Title XIII of H.R. 5269 (known as the Hughes/Kastenmeier proposal). In the interest of fair and informed debate, I would like to set the record straight.

In my May 24, 1990, testimony before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice, I indicated that H.R. 4737 would be a serious step backward in habeas corpus reform, and that its enactment could lead to "increased delay, piecemeal litigation, and more last minute appeals." I understand that Title XIII of H.R. 5269 retains the major flaws contained in H.R. 4737. I am advised that like H.R. 4737, Title XIII of H.R. 5269 permits sentencing challenges in successive habeas corpus petitions, overturns present retroactivity rules, imposes mandatory and burdensome counsel requirements on the States, undermines procedural default rules, and increases time limitations for filing habeas corpus petitions. In my view, enactment of Title XIII of H.R. 5269 would make it extremely difficult for the States to enforce their death penalty laws.

Finally, I note that the statute proposed by the Ad Hoc Committee is contained in a proposed amendment to H.R. 5269 sponsored by Representative Hyde.

I hope this letter will clarify any confusion that may exist on this subject, and facilitate informed choice among the divergent approaches to habeas corpus now before the Congress.

Sincerely,

lfp/ss

Hon. Richard L. Thornburgh
Attorney General
Department of Justice
Washington, D. C. 20503

lfp/ss cc: The Chief Justice bc: R. Hewitt Pate, Esquire

File

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM R. BURCHILL, JR.
GENERAL COUNSEL

October 12, 1990

MEMORANDUM TO THE FORMER AD HOC COMMITTEE ON FEDERAL
HABEAS CORPUS IN CAPITAL CASES

Judge Clark has asked me to send you the attached Congressional Record excerpt containing the House debate on Congressman Hyde's amendment to the Crime Bill, H.R. 5269, to insert into the bill death penalty habeas corpus provisions which are essentially those recommended by the Ad Hoc Committee. As you know, the Hyde Amendment prevailed by a vote of 285 to 146.

There are some unfortunate misstatements in this debate, especially those of Congressman Don Edwards of California at page H-8880. Nevertheless Judge Clark thought that the totality of the debate would be interesting and instructive for you to review.


William R. Burchill, Jr.

Attachment

for the appointment and compensation of counsel.

Mr. Chairman, crime is foremost on the minds of our citizens. No crime is acceptable, yet those that are heinous are even harder to deal with on an emotional and judicial level. This reform is necessary in order for our judicial system to remain effective. Therefore, I urge my colleagues to support the Hughes amendment.

Mr. HUGHES. Mr. Chairman, I yield myself the balance of my time.

Mr. Chairman, what do the judges around the country want? What does the Judicial Conference want? I have not heard the gentleman from Illinois [Mr. Hyde], or the gentleman from Florida [Mr. McCollum] tell us what the judges want.

I will tell Members what they want. They want the Hughes-Derrick or Derrick-Hughes amendment. One of the reasons is if Members vote for the Hyde amendment and do not vote for the Hughes amendment here is what is going to happen: The one difference on successive petitions is one of the differences between Hyde and Hughes. In Hughes, Hughes says that if you have somebody on death row and it is discovered before he is executed that his conviction and sentence was based on perjured testimony, Hyde would not permit it to be used. Hyde would not permit that to be raised in a habeas corpus process. Hughes would.

There are not very many other differences between Hughes and Hyde. The second major difference is Hyde wants two systems in this country, one for the rich and one for the poor. If you are wealthy, if you are affluent, you can afford competent counsel. But if you happen to come from a State that has not opted in, you may get incompetent counsel, and that is the reason we have a 60-percent reversal rate in capital cases in this country, because we have been appointing incompetent counsel.

I urge Members to support the Hughes amendment.

The CHAIRMAN. The question is on the amendment offered by the gentleman from New Jersey [Mr. Hughes].

The question was taken; and the Chairman announced that the noes appeared to have it.

RECORDED VOTE

The HUGHES. Mr. Chairman, I demand a recorded vote.

A recorded vote was ordered.

The vote was taken by electronic device, and there were—ayes 189, noes 239, answered "present" 1, not voting 4, as follows:

[Roll No. 417]

AYES—189

Ackerman	Boucher	Coleman (TX)
Anderson	Boxer	Collins
Applegate	Brooks	Conte
Aspin	Brown (CA)	Conyers
Atkins	Bruce	Cooper
Bates	Bryant	Costello
Bellenson	Bustamante	Courter
Bennett	Cardin	Coyne
Berman	Carper	de la Garza
Boggs	Clay	DePazio
Bonior	Clement	Delums

Derrick	Kostmayer	Rahall
Dicks	LaFalce	Rangel
Dingell	Lancaster	Roe
Dixon	Lanton	Rose
Dorgan (ND)	Leach (IA)	Roybal
Downey	Lehman (FL)	Sabo
Durbin	Levin (MI)	Saugmeister
Dwyer	Levine (CA)	Sawyer
Dymally	Lewis (GA)	Saxton
Eckart	Lipinski	Scheuer
Edwards (CA)	Long	Schneider
Espy	Lowey (NY)	Schroeder
Evans	Luken, Thomas	Schunner
Feacell	Manton	Serrano
Fazio	Markey	Sharp
Feighan	Martinez	Shays
Fish	Matsui	Sikorski
Flake	Mazzoli	Skaggs
Foglietta	McDermott	Slattery
Ford (TN)	McHugh	Slaughter (NY)
Frank	McMillen (MD)	Smith (FL)
Frost	Mfume	Smith (IA)
Gejdenson	Miller (CA)	Solarz
Gephardt	Miller (WA)	Spence
Gillman	Minnick	Spratt
Glickman	Mink	Staggers
Gonzalez	Moakley	Stallings
Gordon	Mollohan	Stark
Gray	Moody	Stokes
Green	Morella	Studds
Guarini	Morrison (CT)	Swift
Gunderson	Mrazek	Synar
Hall (OH)	Murphy	Tauke
Hamilton	Nagle	Torres
Hayes (IL)	Neal (MA)	Towns
Hefley	Nelson	Traffant
Hertel	Nowak	Udall
Hogeland	Oakar	Unschuld
Hochbrueckner	Oberstar	Upson
Hoyer	Obey	Vento
Hubbard	Ortiz	Visclosky
Hughes	Owens (NY)	Volkmer
Jacobs	Pallone	Walgren
Johnson (CT)	Panetta	Washington
Johnston	Patterson	Waxman
Jontz	Payne (NJ)	Weiss
Kaptur	Posee	Wheat
Kastenmeier	Pelosi	Williams
Kennelly	Penny	Wise
Kildee	Pickle	Wolpe
Kleczka	Poshard	Wyden
Kotter	Price	Yates

NOES—239

Alexander	Crane	Herger
Andrews	Dannemeyer	Hill
Annuccio	Darden	Hollaway
Anthony	Davis	Hopkins
Archer	DeLay	Horton
Armey	DeWine	Houghton
AvCoin	Dickinson	Huckaby
Baker	Donnelly	Hunter
Bailenger	Dorman (CA)	Hutto
Barnard	Douglas	Hyde
Bartlett	Dreier	Inhofe
Barton	Duncan	Ireland
Bateman	Dyson	James
Bentley	Early	Jenkins
Bereuter	Emerson	Johnson (SD)
Bevill	Engel	Jones (GA)
Bilbray	English	Jones (NC)
Bilirakis	Frederich	Kanjorski
Bliley	Fawell	Kasich
Boehlert	Fields	Kennedy
Borski	Filippo	Kofke
Bosco	Ford (MI)	Kyl
Brennan	Prenzel	Lagomarsino
Brownfield	Galleghy	Laughlin
Browder	Gallo	Leath (TX)
Brown (CO)	Gardes	Lehman (CA)
Buechner	Geras	Lent
Bunning	Geren	Lewis (CA)
Burton	Gibbons	Lewis (FL)
Byron	Gillmore	Lightfoot
Callahan	Gingrich	Livingston
Campbell (CA)	Goss	Lloyd
Campbell (CO)	Gradison	Lowery (CA)
Carr	Grandy	Lukens, Donald
Chandler	Grant	Machley
Chapman	Hall (TX)	Madigan
Clarke	Hammerschmidt	Marlenee
Clinger	Hancock	Martin (IL)
Coble	Hansen	Martin (NY)
Coleman (MO)	Harris	Mavroules
Combest	Hastert	McCandless
Cordit	Hatcher	McCloskey
Coughlin	Hayes (LA)	McCollum
Cox	Heiner	McCrery
Craig	Henry	McCurdy

McDade	Richardson	Smith, Robert (NH)
McEwen	Ridge	Smith, Robert (OR)
McGrath	Rinaldo	Snowe
McMillan (NC)	Ritter	Solomon
McNulty	Roberts	Stangeland
Meyers	Robinson	Stearns
Michael	Rohrabacher	Stenholm
Miller (OH)	Ros-Lehtinen	Stump
Molinari	Rostenkowski	Sundquist
Montgomery	Roth	Tallon
Moorhead	Roukema	Tanner
Morrison (WA)	Rowland (CT)	Tausch
Murtha	Rowland (GA)	Taylor
Myers	Russo	Thomas (CA)
Natcher	Salki	Thomas (GA)
Neal (NC)	Sarpalius	Thomas (WY)
Nielson	Savage	Torricelli
Olin	Schaefer	Traxler
Owens (UT)	Schiff	Valentine
Oxley	Schulze	Vander Jagt
Packard	Schulze	Vucanovich
Parker	Sensenbrenner	Walker
Parris	Shaw	Walsh
Pashayan	Shumway	Watkins
Paxon	Shuster	Weber
Payne (VA)	Siskaly	Weidon
Perkins	Skeen	Whittaker
Petri	Skelton	Whitten
Pickett	Slaughter (VA)	Wilson
Popper	Smith (NE)	Wolf
Portell	Smith (NJ)	Wylie
Quillen	Smith (TX)	Yatron
Ravenel	Smith (VT)	Young (FL)
Ray	Smith, Dennis (OR)	
Regula		
Rhodes		

ANSWERED "PRESENT"—1

Goodling

NOT VOTING—4

Crockett
Edwards (OK)

Hawkins
Young (AK)

1706

Mr. MAVROULES and Mr. TRAXLER changed their vote from "aye" to "no."

Messrs. OBERSTAR, FLAKE, SHAYS, STOKES, and LEACH of Iowa changed their vote from "no" to "aye."

So the amendment was rejected.

The result of the vote was announced as above recorded.

The CHAIRMAN. It is now in order to consider amendment No. 15 printed in part 2 of House Report 101-796.

AMENDMENT OFFERED BY MR. HYDE

Mr. HYDE. Mr. Chairman, I offer an amendment.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment offered by Mr. Hyde: Amend title XIII to read as follows:

TITLE XIII—HABEAS CORPUS

SEC. 1901. DEATH PENALTY HABEAS CORPUS PROCEEDINGS.

Title 28, United States Code, is amended by inserting after chapter 153 the following new chapter:

"CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

"Sec.

"2256. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.

"2257. Mandatory stay of execution; duration; limits on stays of execution; successive petitions.

"2258. Filing of habeas corpus petition; time requirements; tolling rules.

"2259. Evidentiary hearings; scope of Federal review; district court adjudication.

"2260. Certificate of probable cause inapplicable.

"2261. Application to State unitary review procedures.

"SEC. 2256. PRISONERS IN STATE CUSTODY SUBJECT TO CAPITAL SENTENCE; APPOINTMENT OF COUNSEL; REQUIREMENT OF RULE OF COURT OR STATUTE; PROCEDURES FOR APPOINTMENT.

"(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if subsections (b) and (c) are satisfied.

"(b) This chapter is applicable if a State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

"(c) Any mechanism for the appointment, compensation, and reimbursement of counsel under subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

"(1) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

"(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

"(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

"(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(e) The ineffectiveness or incompetence of counsel during State or Federal collateral post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254 or this chapter. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

"SEC. 2257. MANDATORY STAY OF EXECUTION; DURATION; LIMITS ON STAYS OF EXECUTION; SUCCESSIVE PETITIONS.

"(a) Upon the entry in the appropriate State court of record of an order under section 2256(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application must recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

"(b) A stay of execution granted pursuant to subsection (a) shall expire if—

"(1) a State prisoner fails to file a habeas corpus petition under section 2254 within the time required in section 2258, or fails to make a timely application for court of ap-

peals review following the denial of such a petition by a district court; or

"(2) upon completion of district court and court of appeals review under section 2254 the petition for relief is denied and—

"(A) the time for filing a petition for certiorari has expired and no petition has been filed;

"(B) a timely petition for certiorari was filed and the Supreme Court denied the petition; or

"(C) a timely petition for certiorari was filed and upon consideration of the case, the Supreme Court disposed of it in a manner that left the capital sentence undisturbed; or

"(3) before a court of competent jurisdiction, in the presence of counsel and after having been advised of the consequences of his decision, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254.

"(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution or grant relief in a capital case unless—

"(1) the basis for the stay and request for relief is a claim not previously presented in the State or Federal courts;

"(2) the failure to raise the claim is—

"(A) the result of State action in violation of the Constitution or laws of the United States;

"(B) the result of the Supreme Court recognition of a new Federal right that is retroactively applicable; or

"(C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for State or Federal post-conviction review; and

"(3) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the determination of guilt on the offense or offenses for which the death penalty was imposed.

"SEC. 2258. FILING OF HABEAS CORPUS PETITION; TIME REQUIREMENTS; TOLLING RULES.

"Any petition for habeas corpus relief under section 2254 must be filed in the appropriate district court within 180 days after the filing in the appropriate State court of record of an order under section 2256(c). The time requirements established by this section shall be tolled—

"(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition, if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

"(2) during any period in which a State prisoner under capital sentence has a properly filed request for post-conviction review pending before a State court of competent jurisdiction; if all State filing rules are met in a timely manner, this period shall run continuously from the date that the State prisoner initially files for post-conviction review until final disposition of the case by the highest court of the State, but the time requirements established by this section are not tolled during the pendency of a petition for certiorari before the Supreme Court except as provided in paragraph (1); and

"(3) during an additional period not to exceed 60 days, if—

"(A) a motion for an extension of time is filed in the Federal district court that would have proper jurisdiction over the case upon the filing of a habeas corpus petition under section 2254; and

"(B) a showing of good cause is made for the failure to file the habeas corpus petition within the time periods established by this section.

"SEC. 2259. EVIDENTIARY HEARINGS; SCOPE OF FEDERAL REVIEW; DISTRICT COURT ADJUDICATION.

"(a) Whenever a State prisoner under a capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall—

"(1) determine the sufficiency of the evidentiary record for habeas corpus review based on the claims actually presented and litigated in the State courts except when the prisoner can show that the failure to raise or develop a claim in the State courts is—

"(A) the result of State action in violation of the Constitution or laws of the United States;

"(B) the result of the Supreme Court recognition of a new Federal right that is retroactively applicable; or

"(C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for State post-conviction review; and

"(2) conduct any requested evidentiary hearing necessary to complete the record for habeas corpus review.

"(b) Upon the development of a complete evidentiary record, the district court shall rule on the merits of the claims properly before it.

"SEC. 2260. CERTIFICATE OF PROBABLE CAUSE INAPPLICABLE.

"The requirement of a certificate of probable cause in order to appeal from the district court to the court of appeals does not apply to habeas corpus cases subject to this chapter except when a second or successive petition is filed.

"SEC. 2261. APPLICATION TO STATE UNITARY REVIEW PROCEDURES.

"(a) For purposes of this section, a 'unitary review' procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter applies, as provided in this section, to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

"(b) A unitary review procedure, to qualify under this section, must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2256(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(c) Sections 2257, 2258, 2259, and 2260 apply to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State 'post-conviction review' and 'direct review' in those sections shall be understood as referring to unitary review under the State procedure. The reference in sections 2257(a) and 2258 to 'an order pursu-

ant to section 2258(c) shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2258 shall be deferred until a transcript is made available to the prisoner or the prisoner's counsel."

Page 237, strike line 22 and all that follows through line 13 on page 238.

The CHAIRMAN. Under the rule, the gentleman from Illinois [Mr. HYDE] will be recognized for 10 minutes, and a Member opposed will be recognized for 10 minutes.

The Chair recognizes the gentleman from Illinois [Mr. HYDE].

(Mr. HYDE asked and was given permission to revise and extend his remarks.)

Mr. HYDE. Mr. Chairman, we are going to talk about the need for habeas corpus reform. Habeas corpus is a complicated subject and it would take about a month and a half for a very short course on trying to understand the complexities. However, it is very important.

Habeas corpus is the name of the petition a defendant files who has been convicted in a criminal trial, and who has gone through direct appeal in a State court, and then wants to attack his conviction in a collateral appeal by raising questions of the constitutionality of the proceedings in the State court and any other error, reversible error, he urges, and this is litigated in a secondary or a collateral proceeding.

□ 1710

Now you can do that through the State courts and then you go over to the Federal court and you revisit those issues and you have a collateral appeal through the Federal court.

The problem with habeas corpus is that it has been abused. It has been terribly abused in our country, so there is almost no finality to any criminal sentence.

Now, if you are sentenced to a term of years for a crime, you want a speedy hearing on your habeas corpus petition because you want to get out of there, but if you have been sentenced to death, you are fighting for time and you want delay and delay and more delay. The problem is these delays have frustrated the law and some people remain on death row for 8 years, for 12 years, and the law is made to look foolish and unenforceable and people develop contempt for the law.

We are here today to reform that law, to make it meaningful in a fair and balanced way.

There are 37 States which have capital punishment, and today as we speak there are over 2,350 murderers on death row waiting for something to happen. They are under sentence of death, but in 1988, the last year for which I have statistics, there were only 11 executions. The problem—end-

less, endless collateral appeals permitted by the law.

Now, there were two solutions offered to really reform the habeas corpus law. One was the amendment we just voted down and the other is my amendment.

I have asserted that the Hughes amendment was really not habeas reform, but the amendment that I offer now is not my product. It is the product of a commission headed by former Justice Lewis Powell of the Supreme Court and some distinguished jurists who worked long and hard at the direction of the Chief Justice of the U.S. Supreme Court to come up with recommendations for habeas corpus reform.

The amendment that is before us now is approved by the Conference of Chief Justices, the National Association of Attorneys General, the Attorney General of the United States, and the National District Attorneys Association.

The gentleman from New Jersey [Mr. HUGHES] does remind us from time to time, appropriately so, that he has been a prosecuting attorney in New Jersey and that gives him some authority, but the resort to authority is a useful rhetorical device, and I too have enlisted a lot of fine authorities, including the Powell Commission, who support my amendment.

But let me resort to another authority, a good Democratic Member of this body. That may be redundant, a good Democrat, they are all good, but this one is especially good.

Mr. Chairman, I yield 3 minutes to the gentleman from Alabama [Mr. HARRIS], who holds the distinction of having been a prosecuting attorney and having prosecuted capital cases and sitting as a judge on capital cases.

Mr. HARRIS. Mr. Chairman, I thank the gentleman for yielding me this time.

This House should adopt the Hyde amendment, which incorporates verbatim the Powell committee bill. Law enforcement adamantly opposes the habeas provisions now in the bill before the House and strongly supports the Hyde amendment.

The National Association of Attorneys General, by resolution adopted without a dissenting vote, strongly opposes any habeas legislation which would undermine or weaken the procedural default doctrine or broaden any exception to it; strongly opposes any legislation which would weaken the nonretroactivity doctrine; and strongly opposes any legislation which would create new requirements concerning counsel. The bill before the House does all three of those things. The Powell committee bill, which is incorporated into the Hyde amendment, does not contravene the National Association of Attorneys General's statement of policy contained in the resolution. That is why that law enforcement organization opposes the bill as

presently written and supports the Hyde amendment.

The National Association of District Attorneys, by letter from its President, has also expressed its strong opposition to the habeas provisions in the bill now before this House. As the President of that organization of prosecutors told the Speaker in a letter last week, the bill as now written "grossly increases the opportunities for prisoners under sentence of death and all other convicted offenders to abuse the judicial process and thwart justice." The Hyde amendment will prevent that.

The Powell committee report bill, which is contained in the Hyde amendment, is also supported by the vast majority of State and Federal Judges. The Appellate Judges Conference of the American Bar Association adopted a resolution supporting the Powell committee proposals as a practical and fair resolution of the problems arising in the habeas process. That resolution opposed legislation, like that now in the bill, which would exacerbate the problem of repetitious review rather than ameliorate it.

The National Conference of Chief Justices is composed of the chief justice of every State supreme court. It has adopted a resolution supporting enactment of the Powell committee bill, which is now the Hyde amendment. In that same resolution, the chief justices expressed their opposition to other legislation, like that now in the bill, which would increase rather than decrease habeas delay.

I intend to vote for the Hyde amendment, which is the Powell report bill, because I agree with the National Association of Attorneys General, with the National District Attorneys Association with the Alabama District Attorneys Association, with the Appellate Judges Conference, and with the National Conference of Chief Justices. The bill as written will make the problems with habeas corpus even worse than they are now. On the other hand, the Hyde amendment is an important step toward solving those problems.

Mr. HYDE. Mr. Chairman, I reserve the balance of my time.

Mr. KASTENMEIER. Mr. Chairman, I rise in opposition to the amendment.

The CHAIRMAN. The gentleman from Wisconsin is recognized for 10 minutes.

Mr. KASTENMEIER. Mr. Chairman, I yield 3 minutes to the gentleman from Texas [Mr. BROOKS], the chairman of the Judiciary Committee.

Mr. BROOKS. Mr. Chairman, I rise in opposition to the amendment of the gentleman from Illinois [Mr. HYDE].

The Chairman The gentleman from Texas [Mr. BROOKS] is recognized for 10 minutes.

Mr. BROOKS. Mr. Chairman, there is good reason for this body to proceed carefully but firmly in its treatment of habeas corpus. Some would have you

believe that the concept of habeas corpus was created out of whole cloth—the work of some overzealous, activist judge in the late 1960's looking for a novel way to help criminals escape their just punishment under the law. This view not only distorts history but also ignores the development of fundamental rights in this Nation.

The doctrine of habeas corpus goes back at least 500 years to the laws of England. In his classic commentaries on Anglo-Saxon law, Blackstone referred to habeas corpus simply as the "Great Writ" whose antecedents lie deep in "the genius of our common law." Habeas corpus was called the great writ because it afforded the most basic of rights to a wronged individual—that of a swift and imperative remedy to cases of illegal restraint or confinement. The doctrine immediately became part of our own law in the colonial period, was given explicit recognition in article I, section 9 of the Constitution, and was incorporated in the first grant of Federal court jurisdiction in the Judicial Act of 1789. Early in his tenure, Chief Justice John Marshall termed habeas corpus as perhaps our greatest constitutional privilege.

These were not the extravagant pronouncements of men who had no regard for order in society or for swift and sure punishment for wrongdoing. Rather, they embodied the recognition of our greatest lawmakers that in a civilized society, the government must always be accountable to the judiciary for an individual's imprisonment: If a person's denial of liberty is due to his being deprived of the most fundamental requirements of law, then a demand for immediate release should be heard by the courts forthwith.

Justice Holmes succinctly expressed the rationale behind the use of Federal habeas corpus:

"Habeas corpus cuts through all forms and goes to the very tissue of structure. It comes in from the outside, and does not lie in subordination to proceedings Whatever disagreement there is about the phrase 'due process', there can be no doubt that it embraces the fundamental conception of a fair trial." (*Frank v. Magnum*, 237 U.S. AT 346-347).

In short, while habeas corpus deals with a mode of procedure for those detained, it is inevitably intertwined with concepts of due process and personal liberty. All these considerations must be balanced if the work product of this body is to be responsive to the complex and multiple needs of our society.

The Judiciary Committee has kept these principles in mind by crafting a usable set of uniform procedures for implementation in the courts. To those who choose to ignore the long history of the great writ, to those who conveniently forget the central role habeas corpus has played in times of national crises when the claims of order and liberty have clashed most acutely, I would advise them to think

twice before clamoring for the emasculation of a doctrine that is as deeply rooted in our history and rule of law as any that exists today.

□ 1720

Mr. KASTENMEIER. Mr. Chairman, I yield myself 2 minutes.

Mr. Chairman, I appreciate very much the historical perspective given this body by the gentleman from Texas. The fact is we are today confronted with two options: One, a mandatory uniform reform of habeas corpus that makes habeas corpus respond only once, you get one shot at it, that foreshortens the periods for which you can either file a habeas corpus petition, or you can vote for the Hyde amendment.

The Hyde amendment is not mandatory and is not uniform, and you should know it.

It requires States to opt in, then it is operational. For those States that do not opt in, you have the present habeas corpus applying. And to opt in requires of the States representation by counsel.

Mr. Hyde has that in his bill. But if they do not opt in, you have the same habeas corpus in those States that has preexisted that everybody has been complaining about, you have a dual system.

So I ask you urgently to turn down the Hyde option.

Mr. Chairman, I yield 2 minutes to the gentleman from New Jersey [Mr. HUGHES].

(Mr. HUGHES asked and was given permission to revise and extend his remarks.)

Mr. HUGHES. Mr. Chairman, I know it is not going to make any difference, but I have to say something that I feel very strongly about: I served in the National District Attorneys Association for about 10 years, and I was proud of that service. I tried a lot of criminal cases, and I am as sensitive as anybody to the absolute certainty we need in the system.

What troubles me about Powell and Hyde, the Powell Commission report and Hyde, is that we are going to have in this country two basic systems, one for the very rich and one for the very poor.

States do not have to opt in and take advantage of the new reform rules.

We need to reform habeas corpus. They do not have to do that. The price for them to opt in is to appoint competent counsel.

That does not make sense, to have a fundamental process in this country that is going to see two standards, one for the rich and one for the poor.

That is bad enough, but what troubles me even more is that the Hyde amendment has a provision dealing with successive petitions that deny the defendant on death row to have a Federal court review his habeas corpus process even if it is based upon perjured testimony directed to the sentence. If it is directed—I see the gen-

tlemen shaking his head. If it is directed to the verdict, not to the sentence, it is reviewable.

But if it is directed to the sentence, it is not reviewable if in fact he has petitioned for habeas corpus.

If the gentleman wants to say that is not true, I will yield to the gentleman from Illinois, if he will say it is not true.

Mr. HYDE. I am sorry. If I say what is not true?

Mr. HUGHES. If you would say that what I am claiming, that if in fact a defendant has exhausted his habeas corpus process—

Mr. HYDE. You mean he has gone up the State system, he has had a direct appeal, a Federal collateral appeal before the judges—

Mr. HUGHES. Mr. Chairman, I reclaim my time. The gentleman was not listening. I reclaim my time.

The CHAIRMAN. The time of the gentleman from New Jersey has expired.

Mr. KASTENMEIER. I yield 30 seconds additional to the gentleman from New Jersey [Mr. HUGHES].

Mr. HUGHES. I thank the gentleman.

I will explain it again, I will state it again. If the defendant is sitting on death row and has exhausted his State habeas corpus process after the direct appeal and has gone through his review, and 180 days, his Federal habeas corpus review process, and newly discovered evidence suggests that the defendant was sentenced based upon perjured testimony, that is not reviewable under the Hyde amendment, not reviewable.

Now, what has happened to our basic fundamental fairness in this country? How in the world can you go back to your districts and suggest that that is fair? I cannot.

Mr. KASTENMEIER. Mr. Chairman, I believe I have 2½ minutes remaining.

The CHAIRMAN. The gentleman is correct.

Mr. KASTENMEIER. Mr. Chairman, I reserve my remaining time.

Mr. HYDE. Mr. Chairman, I have 3 minutes left, do I not?

The CHAIRMAN. The gentleman is correct.

Mr. HYDE. I have the right to close, do I not?

The CHAIRMAN. Yes, the gentleman is correct.

Mr. HYDE. Then I will reserve my time, Mr. Chairman.

The CHAIRMAN. The Chair recognizes the gentleman from Wisconsin [Mr. KASTENMEIER].

Mr. KASTENMEIER. Mr. Chairman, I yield 2½ minutes to the gentleman from California [Mr. EDWARDS].

(Mr. EDWARDS of California asked and was given permission to revise and extend his remarks.)

Mr. EDWARDS of California. Mr. Chairman, the habeas reforms in the bill will guarantee competent legal

representation at the trial of capital cases. If you want genuine habeas reform, trial counsel is the key. The committee bill sets clear standards for the competency of trial counsel in capital cases. But the Hyde amendment does not address the issue of trial counsel at all. The Hyde amendment's counsel provisions apply only after trial. By then it's too late—the errors have been made, and either you send a person to the electric chair who was unconstitutionally sentenced or you send the case back for a new trial.

My subcommittee held a hearing on the types of lawyers who currently represent capital defendants at trial. Here are some examples:

In one death case in Mississippi, the defendant was represented by a third-year law student.

In one Georgia circuit, capital cases were assigned to defense lawyers on a low bid system. The only qualification to submit a bid was membership in the Georgia bar. The lowest bidder got the case.

In four different capital trials in Georgia, at some point in the proceeding the defense lawyers referred to their clients as "niggers." The death sentence was imposed in all four cases.

There have been capital cases in Mississippi and Georgia where the defense attorney's first criminal jury trial was a capital trial.

Last year in Alabama, a capital case had to be stopped midtrial because the defense lawyer was drunk. He was held in contempt and sent to jail to dry out. The next morning he and his client were both produced from jail, the trial resumed, and the death penalty was imposed a few days later.

Lawyers like these would continue handling death cases under the Hyde amendment.

One reason for this scandalous situation is money. Alabama, Mississippi, and Arkansas limit the compensation of defense counsel in a capital case to \$1,000. South Carolina pays up to only \$1,500. Any lawyer who wants to do a good job ends up working for less than the minimum wage.

Would any Member in this body trust his life to a lawyer getting paid less than the minimum wage? Yet the Hyde amendment would allow States to continue appointing lawyers to represent capital defendants for less than minimum wage.

With legal representation like this, the death sentence becomes a lottery in which the death penalty is imposed not on the most horrendous offenders but on the defendants with the most horrendous lawyers.

Under the Hyde amendment, capital defendants would continue to be represented at trial by incompetent attorneys who failed to recognize and raise constitutional issues, and defendants would continue being sentenced to death not because of their culpability but because of the mistakes of their lawyers. In contrast, the Hughes reform provisions will provide compe-

tent counsel at trial, so trials are properly conducted at the outset and the death penalty is not a lottery.

Mr. HYDE based his amendment on the recommendations of the Powell Commission, which he claims is the responsible and respectable solution to the habeas corpus issue.

The truth is that the Powell proposal is the result of a plot by Chief Justice Rehnquist to enact his personal destructive agenda for habeas.

In 1988, ignoring the separation of powers principle, Rehnquist appointed an ad hoc committee of the Judicial Conference to write proposed habeas legislation.

The committee, chaired by former Justice Powell, was stacked with conservative judges from the two southern "death circuits" where more than three-quarters of the executions since 1976 have taken place. Ignoring the wishes of the full Judicial Conference, the Chief Justice adopted their recommendations. This amendment is solely the work of the Chief Justice and his handpicked opponents of habeas corpus. It is not the neutral, responsible product Mr. HYDE claims.

I urge a yes vote on Hughes and a no vote on Hyde.

The CHAIRMAN. The gentleman from Illinois [Mr. HYDE] has 3 minutes remaining.

□ 1730

Mr. HYDE. Mr. Chairman, I do not know where to start. I have never heard so many falsehoods, misstatements and errors in my life.

The Judicial Conference made two modifications in the Powell Commission suggestions. Then they accepted the rest of the Rehnquist agenda. Justice Powell, who chaired this committee, is against the death penalty, just like the gentleman from Wisconsin [Mr. KASTENMEIER], and just like the gentleman from California [Mr. EDWARDS]. Judge Rooney on the commission is against the death penalty. To imply that Justice Rehnquist stacked the commission is outrageous.

Now do not destroy habeas corpus under the Hyde amendment. We must have competent counsel. Under the U.S. Constitution and Supreme Court cases, at the trial level there must be competent counsel. At the appeal level there must be competent counsel.

Then we go to habeas corpus in the State system, trial court, appeals court, Supreme Court. Now we move to the Federal courts, trial court, appellate court, writ of certiorari, to the Supreme Court. Twenty-seven judges have heard the case by this time, and my colleagues say that is murdering habeas corpus.

It is common sense. That is why the prosecutors are for my amendment. It is habeas corpus reform.

The amendment that the gentlemen want, do my colleagues know what it says? On page 208 it says that the application shall be dismissed unless the interests of justice would be served by

reconsideration of claim. Mr. Chairman, that means endless, endless, endless delay.

I say to my colleagues, "If you are convicted because of perjured testimony, your guilt or innocence is always open to be explored in successive petitions with a stay of execution, not the validity of your sentence after 27 judges have passed on it." We want it to be final.

However, Mr. Chairman, I say, "Then you go to the Governor and say, 'Hey, I was sentenced on perjured testimony,' but, as to your guilt or innocence, you can always raise that."

Now let me simply say to my colleagues that the attorneys general of this country, Democrats and Republicans, the prosecuting attorneys, even the attorney general of the gentleman from New Jersey [Mr. HUGHES] and, if I had that letter—here is his letter. Now here is his own attorney general, the prosecutor, that we have with us, which we are lucky to have. He says that there are also provisions in the proposed statute aimed solely at capital cases. The effect of these provisions would be to add so much delay, so many new issues and so much relitigation to the process that very few, if any, death sentences would ever be carried out, even in the most aggravated cases.

Mr. Chairman, that is why the gentleman from California [Mr. EDWARDS] is for it.

Mr. HUGHES. Mr. Chairman, will the gentleman yield?

Mr. HYDE. No, I will not.

Mr. HUGHES. But I yield to the gentleman.

Mr. HYDE. I know the gentleman from New Jersey did, and he is a generous guy.

Mr. Chairman, I will yield to the gentleman from New Jersey [Mr. HUGHES] if he will tell me this is not from his attorney general.

Mr. HUGHES. Mr. Chairman, will the gentleman yield?

Mr. HYDE. I yield to the gentleman from New Jersey.

Mr. HUGHES. No, the attorney general of my State was directing his remarks to the previous one, not to the Hughes amendment.

I say to the gentleman that he had not seen the amendment that I offered along with the gentleman from South Carolina [Mr. DERRICK] and that is the problem. There is so much confusion.

Mr. HYDE. Mr. Chairman, I reclaim my time because we are talking at cross purposes.

Now, the Attorney General of the United States says that the amendment of the gentleman from New Jersey [Mr. HUGHES], which is gone, I am happy to say; the underlying goal of this strategy has nothing to do with fairness. It has everything to do with frustrating enforcement of the death penalty by excessive delay through re-

dundant and repetitive habeas corpus appeals.

Mr. JAMES. Mr. Chairman, I rise today in support of the Hyde amendment. Federal habeas corpus reform is long overdue. The Hyde amendment provides us with the provisions to bring some semblance of order and finality to what is currently a chaotic and virtually endless process.

Last year, the Powell Committee issued their report on the use of habeas corpus petitions in State death penalty cases. It was the conclusion of the committee that the present system of collateral review operates to frustrate the law of 37 States. The unnecessary delays and repetitions result in judicial proceedings which average 8 years and 2 months. Mr. Chairman, I find it unconscionable that the American taxpayers are oftentimes forced to bear the costs of these successive petitions which are, in most cases, meritless, and that are filed at the 11th hour seeking nothing more than to delay justice.

The amendment before us seeks to rectify this situation. By incorporating the Powell recommendations, the Hyde amendment strives to create a nexus between a subsequent habeas corpus petition and the defendant's guilt or innocence. I firmly believe that the current provisions in the crime bill fail to accomplish this. Therefore, I urge my colleagues to support the Hyde amendment and achieve true habeas corpus reform.

Mr. COUGHLIN. Mr. Chairman, I rise in strong support of the Hyde amendment which represents the genuine habeas corpus reform so desperately needed in our criminal justice system.

The committee bill before us today would overturn or seriously weaken numerous Supreme Court decisions that currently limit the delay and abuse of the judicial process. It greatly increases the opportunities for prisoners sentenced to death and all convicted offenders to abuse the judicial process and thwart justice. It creates numerous obstacles of procedural delay and abuse that have absolutely nothing to do with a defendant's guilt or innocence. All in all, this bill does not address the abuse of habeas corpus that has virtually nullified the death penalty laws of the States and clearly makes an already intolerable situation even worse.

Mr. Chairman, the Hyde amendment incorporates the basic reforms recommended by the Powell Committee which have the strong support of the Bush administration, the National District Attorneys Association, and the National Association of Attorneys General. This amendment strengthens the hand of law enforcement without sacrificing fairness to the defendant. I urge my colleagues to enact a tough anticrime bill by supporting the Hyde amendment.

Mr. MATSUI. Mr. Chairman, I rise in support of the habeas corpus reforms before us today, and against the amendment being offered by Representative HYDE to strike these reforms from H.R. 5269, the Comprehensive Crime Control Act.

H.R. 5269 would provide defendants the opportunity to appeal their case on the basis of the sentence. The language in the Hyde amendment limiting appeals to the conviction only is far too limited. This is an important distinction. Evidence shows that a disproportionate number of those on death row are minorities, particularly African-Americans. According

to the General Accounting Office, individuals who were convicted of murdering a white victim were more likely to be sentenced to death than those who murdered a black victim.

The Hyde amendment is far too restrictive, because not all sentences are clear cut. But limiting appeals to challenging on the verdict and not the sentence ignores the reality that not all sentences are just.

The provisions in the bill requiring competent counsel to defendants are also of great importance. The language included in H.R. 5269 requires that competent counsel be provided at both the trial and appeal levels. These provisions are about fairness. Everyone deserves a fair trial and competent counsel, regardless of the crime of which he or she is accused or convicted. The Hughes amendment will ensure that competent counsel is provided to all defendants, regardless of their crime.

The State of California has in place habeas corpus provisions similar to those included in H.R. 5269. The experience in the State has been far from cataclysmic. In fact, the opposite has occurred. While the standards established in California far exceed those included in H.R. 5269, there has not been a tremendous drop in the number of available counsel for capital cases. There remains a sufficient pool of attorneys to handle these cases.

I urge my colleagues to oppose the attempt before us to weaken the habeas corpus reforms included in H.R. 5269. It is imperative that we provide due process to all defendants, regardless of how offensive we find the crime they committed.

The CHAIRMAN. All time has expired.

The question is on the amendment offered by the gentleman from Illinois [Mr. HYDE].

The question was taken; and the Chairman announced that the ayes appeared to have it.

RECORDED VOTE

Mr. KASTENMEIER. Mr. Chairman, I demand a recorded vote.

A recorded vote was ordered.

Vote was taken by electronic device, and there were—ayes 285, noes 146, answered "present" 1, not voting 1, as follows:

[Roll No. 416]

AYES—285

Alexander
Andrews
Annunzio
Anthony
Applegate
Archer
Armey
Atkins
Baker
Ballenger
Barnard
Bartlett
Barton
Bateman
Bennett
Bentley
Bereuter
Bevil
Blibray
Blumenthal
Bliley
Boehner
Bonzel
Bosco
Bricker
Broun

Browder
Brown (CO)
Bruce
Buechner
Bunning
Burton
Bustamante
Byron
Callahan
Campbell (CA)
Campbell (CO)
Carr
Chandler
Chapman
Clarke
Clement
Clinger
Coble
Coleman (MO)
Colman (TX)
Conest
Condit
Cooper
Costello
Coughlin
Courtney

Cox
Craig
Crane
Dannemeyer
Darden
Davis
de la Garza
DeFay
Derrick
DeWine
Dickinson
Dicks
Dingell
Donnelly
Dornan (CA)
Douglas
Dreier
Duncan
Dwyer
Dyson
Early
Edwards (OK)
Emerson
English
Erdreich
Espy

Ackerman
Anderson
Aspin
AuCoin
Bates
Bellemont
Berman
Boggs
Bonior
Boxer
Brennan
Brooks
Brown (CA)
Bryant
Cardin
Carper
Clay
Coffins
Conte
Conyers
Coyne
Crockett
DeFazio
Dellums
Dixon
Dorgan (ND)
Downey

Durbin
Dymally
Eckart
Edwards (CA)
Engel
Evans
Fazio
Feighan
Fish
Flake
Foglietta
Forness
Ford (TX)
Frank
Frost
Gajdardzich
Gephardt
Glickman
Gonzalez
Gray
Green
Hall (OH)
Hamilton
Hawkins
Hayes (IL)
Hefley
Hoagland

Hochbrueckner
Hoyer
Hughes
Johnston
Jents
Kaghan
Kastenmeier
Kennedy
Kennedy
Kilde
Klecko
Kostmayer
LaFalce
Leach (IA)
Lehman (FL)
Levin (MI)
Levine (CA)
Lewis (GA)
Long
Lowery (NY)
Lukens, Thomas
Markley
Matsui
McClintock
McDermott
McHugh
McMillen (MD)

NOES—146

Lowery (CA)
Lukens, Donald
Machley
Madigan
Manton
Marlenee
Martin (IL)
Martin (NY)
Martinez
Mavroules
Mazzoli
McCandless
McCormack
McCurdy
McDade
McEwen
McGrath
McMillan (NC)
Meyers
Michel
Miller (OH)
Moakley
Moffatt
Montgomery
Moorhead
Morrison (WA)
Murphy
Murtha
Myers
Natcher
Neal (MA)
Neal (NC)
Nelson
Nichols
Ortiz
Oxley
Packard
Pallone
Parker
Parris
Pashayan
Patterson
Paxon
Payne (VA)
Perkins
Petri
Pickett
Pickle
Polar
Postard
Purcell
Quillen
Ravenel
Ray
Ragula
Rhodes
Richardson
Ridge
Rinaldo
Ritter
Roberts
Robinson
Roe
Rohrabacher
Rosa-Lehtinen
Rostenkowski
Roth
Roukema
Rowland (CT)

Rowland (GA)
Russo
Sakl
Santagosto
Sarpallus
Saxton
Schaefer
Schiff
Schneider
Schuette
Schulze
Sensenbrenner
Shaw
Shays
Shumway
Shuster
Siskiy
Skeen
Skelton
Slaughter (VA)
Smith (IA)
Smith (NE)
Smith (TX)
Smith (VT)
Smith, Denny
(OR)
Smith, Robert
(NH)
Smith, Robert
(OR)
Snow
Solomon
Spencer
Spratt
Staffings
Stangeland
Stearns
Stenholm
Stump
Sundquist
Tallon
Tanner
Taske
Tausin
Taylor
Thomas (CA)
Thomas (GA)
Thomas (WY)
Torricelli
Traill
Traxler
Upton
Valentine
Vander Jagt
Volkmann
Vucanovich
Walker
Walsh
Watkins
Weber
Weldon
Widener
Wirth
Wirth
Wills
Wolf
Wyden
Wylie
Yatron
Young (AK)
Young (FL)

McNulty	Pelosi	Staggers
McNamee	Penny	Stark
Miller (CA)	Price	Stokes
Miller (WA)	Rahall	Studda
Moneta	Rangel	Swift
Mink	Rose	Synar
Mollohan	Roybal	Torres
Moody	Sabo	Towns
Murrella	Savage	Udall
Morrison (CT)	Sawyer	Unsoeld
Mrazek	Scheuer	Vento
Nagle	Schroeder	Visclosky
Nowak	Schumer	Walgren
Oakar	Serrano	Washington
Oerstar	Sharp	Waxman
Obey	Sikorski	Weiss
Olin	Skaggs	Wheat
Owens (NY)	Slattery	Williams
Owens (UT)	Slaughter (NY)	Wise
Panetta	Smith (FL)	Wolpe
Payne (NJ)	Smith (NJ)	Yates
Phase	Solarz	

ANSWERED "PRESENT"—1

Goodling

NOT VOTING—1

McCrery

□ 1753

Mr. RAHALL changed his vote from "aye" to "no".

Mr. TAUCHE changed his vote from "no" to "aye."

So the amendment was agreed to.

The result of the vote was announced as above recorded.

The CHAIRMAN. It is now in order to consider amendment No. 16 printed in part 2 of House Report 101-796.

AMENDMENT OFFERED BY MR. FRANK

Mr. FRANK. Mr. Chairman, I offer an amendment.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment offered by Mr. FRANK: Page 106, line 14, insert "(a) IN GENERAL.—" before "Federal Prison Industries".

Page 106, after line 18, insert the following:

(b) LIMITATION ON PRODUCTION.—Before the report is made to Congress under subsection (a), Federal Prison Industries shall not produce a new specific product or expand the production of an existing specific product if—

(1) the product is manufactured by the footwear, apparel, textile, or furniture industries, and

(2) the production or expansion of production was not approved by the Federal Prison Industries Board of Directors on or before July 1, 1990.

The CHAIRMAN. Under the rule, the gentleman from Massachusetts [Mr. FRANK] will be recognized for 5 minutes, and the gentleman from Wisconsin [Mr. KASTENMEIER] will be recognized for 5 minutes in opposition.

The Chair recognizes the gentleman from Massachusetts [Mr. FRANK].

Mr. FRANK. Mr. Chairman, I yield myself 90 seconds.

Mr. Chairman, we have an entity called Prison Industries. They employ prisoners. We have no objection to that.

My amendment says that this program shall not expand into several very sensitive areas, sensitive in the notion that we are losing jobs to imports, until a study is done of the impact of those jobs.

The Senate adopted an amendment mandating significant expansion in these areas. We are saying with regard to clothing and textiles, furniture, and shoes, because people here have already lost their jobs—we are not trying to put any existing prison industry out of business—but we are saying that they should not go ahead with a Senate-mandated expansion until we can do a study.

The Senate language specifically said that they are targeting in the expansion those jobs where we have already had high foreign penetration. Yes, we should be supportive of proper rehabilitation programs, but not at the expense of the hard-working, poorly compensated people who are already at risk.

The amendment does not put a stop to anything the Prison Industries is now doing. It says that they may not expand their job operations in those three areas, clothing and textiles, furniture, and shoes, until we have completed a study on the job impact.

We recently passed legislation on the textile bill trying to protect these people. This is another way to do it.

Mr. KASTENMEIER. Mr. Chairman, I yield myself 3 minutes.

Mr. Chairman, for those who may not among our colleagues be familiar with the Federal Prison Industries Program, let me briefly explain what it is. All of our Federal prison inmates work. Prison Industries employs inmates to produce goods and services for the Federal Government, not for private consumption, for the Federal Government.

Work keeps these inmates busy, keeps the prisons relatively safe and well-managed in the face of unprecedented prison overcrowding, and I must say to my colleagues, by this bill, and that is what you will intend by this bill, you plan to send a lot of additional people to these Federal penitentiaries. As a matter of fact, we had 24,000 in 1980. Now we have nearly 60,000, and we will nearly double that in 4 or 5 years.

□ 1800

If that is the case, you cannot have it both ways. You had better make sure the people you are sending to Federal prisons have work. They must have work.

This amendment, however well-intentioned, means that in areas of special concern to prisons in terms of their industries, they will not be able to expand; footwear, furniture, textiles—you are forcing them from one of the most important areas, and while I sympathize with the gentleman from Massachusetts, because I have urged them myself to drop the proposal to increase the ability to make footwear in the Federal prisons, a highly import-sensitive area, at least until they considered it at their board level; but if we adopted the Frank amendment, it only will be a matter of time

before we would adopt other exclusions; They cannot make anything.

Then what are you going to have these people do in prison? It would be, I think, highly irresponsible to single out specific industries for special treatment. Every industry in America would line up and ask to be added to the list.

We are operating now at 170 percent of capacity in the Federal system. We are going to double by the year 1995.

I urge my colleagues to reject this amendment.

I reserve the balance of my time.

Mr. FRANK. Mr. Chairman, I yield 1 minute to the gentleman from Michigan [Mr. HENRY].

Mr. HENRY. Mr. Chairman, I rise in strong support of the Frank amendment.

Let me make very clear that this does not reduce Prison Industries one bit. It calls for a freeze of the expansion of Prison Industries into those three market areas in which Prison Industries already accounts for 60 percent of the total FPI product.

All this amendment does is seek to ensure that as Prison Industries expands, it expands in such a way as to not have a deleterious impact on particular areas of the economy—furniture, apparel, textiles, the same areas that this House voted two out of three to protect our textile workers against unfair foreign competition, and now it addresses the problem of unfair competition at home.

This amendment is supported by the United Auto Workers, the Steelworkers, the Food and Commercial Workers, the Brotherhood of Carpenters, the National Office Products Association, the National Federation of Independent Business, the National Association of Manufacturers, the Ladies' Garment Workers Union, the Footwear Industries of America, the Coalition for Government Procurement, the American Clothing and Textile Workers Union.

This has broad labor support and broad business support, and it simply calls for a study before we expand in this area.

Mr. KASTENMEIER. Mr. Chairman, I yield 1 minute to the gentleman from Texas [Mr. BROOKS].

(Mr. BROOKS asked and was given permission to revise and extend his remarks.)

Mr. BROOKS. Mr. Chairman, I rise in opposition to the amendment.

The Federal Prison Industries Program is one of the most important tools that the Bureau of Prisons has to manage a prison population that is now 170 percent of capacity. The prison industries provide much needed meaningful activity and training for Federal prison inmates.

Complaints about the Prison Industries Program usurping private industry are already being addressed. The Judiciary Committee in both this Congress and the previous Congress placed

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.
RETIRED

October 15, 1990

Ad Hoc Committee on Federal Habeas

MEMO TO MEMBERS OF THE COMMITTEE:

Perhaps you have seen in the press that the House adopted an amendment to the Anti-Crime Bill that includes the recommendations of our Committee.

It is not clear to me as to exactly what the Senate adopted. My understanding is that it included both the Biden bill (quite different from ours) and Senator Strom Thurmond's bill that includes the substance of our recommendations. No one can predict what will happen when these bills go to Conference.

I enclose a copy of the Washington Post article of October 5. I send best wishes to each of you.

Sincerely,

Lewis

lfp/ss
Enc.

cc: The Chief Justice
Professor Albert M. Pearson
William R. Burchill, Jr., Esquire
R. Hewitt Pate, Esquire

House Votes to Broaden Use of Death Penalty and Curb Appeals

By Michael Isikoff
Washington Post Staff Writer

The House yesterday voted to establish a federal death penalty for large-scale drug trafficking and more than 20 other crimes and to sharply restrict the appeal rights of death row inmates.

Moving toward passage of a far-reaching anti-crime bill, the House also rejected the pleas of law enforcement groups and adopted by a vote of 257 to 172 an amendment, backed by the National Rifle Association, that would permit the continued manufacture of semiautomatic assault weapons made with domestically produced parts. The Bush administration last year

banned importation of foreign-made assault weapons, but imposed no restrictions on identical U.S.-made weapons.

Civil liberties groups and some House Democratic leaders denounced the votes as "senseless" pre-election responses to reports of soaring rates of violent crime in many cities. At one point some Democrats sarcastically called out, "Kill! Kill! Kill!"

"Would it be possible to bring the guillotines directly to the House floor?" asked an angry Rep. David R. Obey (D-Wis.).

But the actions were a victory for the Bush administration, which last month mounted a major lobbying offensive against a different anti-crime package that had been ap-

proved by the House Judiciary Committee. Branding the committee's measure "pro-criminal," Attorney General Dick Thornburgh and other administration officials mobilized groups of district attorneys and attorneys general to urge the House to substitute President Bush's more stringent proposals aimed at streamlining death row appeals and expediting executions by the states.

The result was a series of stinging rebukes for the committee. On a vote of 285 to 146, the House adopted an administration-backed amendment by Rep. Henry J. Hyde (R-Ill.) that would limit habeas corpus petitions death row inmates could bring in federal courts. In recent years, inmates have commonly used such petitions to raise repeat-

ed constitutional challenges to their convictions, resulting in what Hyde said were "endless, endless, endless delays" in the execution of convicted murderers.

The amendment would adopt the recommendations of a judicial committee headed by former Supreme Court justice Lewis Powell. It would permit states to set up an accelerated system in which a competent counsel would be appointed for each death row inmate, who would be allowed to file one habeas corpus petition within 180 days. If the Supreme Court rejected the appeal, further challenges would be barred except in extraordinary circumstances, and the execution would proceed.

The House also adopted amend-

ments that would substantially add to the list of federal crimes for which the death penalty could be applied: train wrecks or airplane bombings that result in death, murder with mail bombs, and drug trafficking when the drugs lead to overdose deaths, even if accidental. Major drug traffickers would face the death penalty regardless of whether they ordered or committed murder.

Some experts said the bill could raise a host of new constitutional questions. "There could be a new flurry of litigation around this very bill that could have the opposite effect" than the one sponsors desire and might actually delay executions, said Michael Kroll, executive director of the Death Penalty Information Center.

October 15, 1990

Ad Hoc Committee on Federal Habeas

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cc: The Chief Justice
Professor Albert M. Pearson
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OCT 31 1990

October 26, 1990

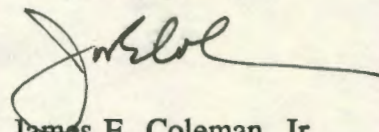
The Honorable Lewis F. Powell, Jr.
Associate Justice (Retired)
The United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Dear Justice Powell:

I am sending you a copy of an article that I recently wrote for the ABA's Litigation magazine concerning my experience representing Ted Bundy in post-conviction proceedings. Because of your interest in reform of the post-conviction process in capital cases, I hope you will find the article informative.

I have read your Harvard Law Review article and your Committee's report on the need to reform the manner in which post-conviction proceedings are conducted. I share many of your concerns and believe that your Committee made constructive recommendations, although I disagree with the recommendation to limit successive petitions to those in which the defendant asserts a colorable claim of innocence. In the current political environment, however, I am afraid that the Congress will do more harm than good. Moreover, I do not believe anyone has paid much attention to the adverse effect the present situation has had on the integrity of the courts. My article attempts to point out some of the more troubling consequences of the manner in which post-conviction proceedings sometimes are conducted. Since the article was published, I have received letters or heard from several lawyers who have had experiences similar to mine; this supports my belief that the experience I describe in the article is not unique.

Very truly yours,



James E. Coleman, Jr.

November 5, 1990

Dear Mr. Coleman:

Thank you for your letter and for sending me a copy of your article in the ABA Litigation magazine concerning your experience representing Ted Bundy in post-conviction proceedings.

As you suggest in your letter, we share generally similar views but you disagree with the recommendation of the Ad Hoc Committee to "limit successive [habeas corpus] petitions to those in which the defendant asserts a colorable claim of innocence."

Professor Pearson at the University of Georgia, who was the Reporter for the Ad Hoc Committee, recently made a study in which he concluded that successive petitions are rarely successful. They do burden the courts.

My own view is that the death sentence should be abolished in our country as it has in the other western democracies.

Sincerely,

James E. Coleman, Jr., Esquire
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D. C. 20037-1420

lfp/ss

23 NOV 1990



Ad Hoc File

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM R. BURCHILL, JR.
GENERAL COUNSEL

November 20, 1990

Honorable Lewis F. Powell, Jr.
Associate Justice, Retired
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543


Dear Justice Powell:

Thank you very much for your nice letter of November 20. I am pleased that my advice was helpful in clarifying your situation with respect to the approaching salary increase.

I appreciate as well receiving those kind words from Hew Pate. I certainly think highly of him and am pleased to learn that he is now with Hunton and Williams. I have recorded his telephone number in my directory, as I anticipate that he and I will have frequent occasion to communicate in the future.

Although I am sure that the completion of the Ad Hoc Committee's work came as something of a relief to all of us, I miss our meetings and the chance to see you and the other members. I hope to see you again sometime in the near future. In the meantime, my very best wishes for the Holiday season,

Sincerely,


William R. Burchill, Jr.
General Counsel

cc: Hewitt Pate, Esq.

26 NOV 1990

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

SAM J. ERVIN, III
Chief Judge
P.O. Drawer 2146
Morganton, North Carolina
28655

November 26, 1990

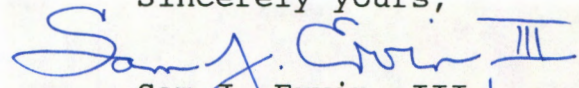
Professor Albert N. Pearson
School of Law
University of Georgia
Athens, Georgia 30602

Dear Professor Pearson:

Justice Powell was kind enough to send me a copy of his letter to you concerning our need for information about the experience that Georgia has had with its Death Penalty Resource Center. I feel that it is very important that Virginia establish such a center and we are hopeful that your experiences will enable us to persuade them to follow your lead.

Justice Powell must have misunderstood something that I said about the North Carolina Resource Center. I think that it has been very productive, but the head of the center is leaving almost immediately and I thought that perhaps we should ask someone else to assist us in this effort at persuasion. John Blume of the South Carolina Resource Center would be glad to help you if you would like to call upon him.

Sincerely yours,


Sam J. Ervin, III
Chief Judge

SJE:wmm

CC: Justice Powell ✓



The University of Georgia

School of Law

11 DEC 1990

December 7, 1990

The Honorable Lewis F. Powell
Associate Justice, Retired
United States Supreme Court
Washington, DC 20543

Dear Justice Powell:

I write to ask a favor. At the end of the present academic year, I am "retiring" as director of the Law School's Legal Aid and Defender Clinic. Naturally, I have been pondering what to do next. Quite by chance, the Solicitor General was in Athens in late October to deliver a speech to a Bar-Media Conference. Ken and I had become acquainted because he was a member of the commission that selected me to be the Judicial Fellow at the Court in 1987-88.

During a conversation, I broached the subject of working in the Solicitor General's office on a one or two year basis. Ken noted that there was precedent for a scholar in residence person in the office and seemed genuinely interested in considering the matter further. I followed up with a letter recently. Ken is aware of my work with the Powell Committee and, for that reason, he might contact you at some point. After a "warts and all" review of my working relationship with you and the Committee, I hope that you can suggest some compelling reasons why I might be a forceful and effective advocate in matters brought before the Court.

I trust that your health is holding up well and that you are "coping" with life after the habeas corpus project.

Sincerely,

Albert M. Pearson
Professor of Law

AMP/khb

December 12, 1990

Dear Ken:

Al Pearson, Professor of Law at the University of Georgia, has told me that he is applying to you hoping to serve as an Assistant in your office. I think you are familiar with Al's work with the Ad Hoc Committee on Federal Habeas Corpus appointed by Chief Justice Rehnquist. The members of this Committee, that I chaired, have a high opinion of Al.

There is no question as to his ability as a scholar and lawyer. My understanding is that he also has done a fair amount of both trial and appellate work in Georgia. In sum, I would be happy to have Al associated with me in important or scholarly legal work.

Sincerely,

Hon. Kenneth W. Starr
Solicitor General
Department of Justice
Washington, D. C. 20530

lfp/ss

bc: Professor Albert M. Pearson